United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

76-7161

B
P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-7161

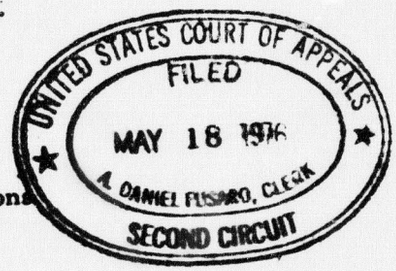
FLM COLLISION PARTS, INC.,
Plaintiff-Appellee-Cross-Appellant,

—against—

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,
Defendants-Appellants-Cross-Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
(D.C. 73 Civ. 713 (T.P.G.))

JOINT APPENDIX



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§ 1 Initiation of the Action
§ 2 Plaintiff's Preliminary Injunction Motions
§ 3 Other Pre-Trial Developments

(Counsel Listed on Inside Page)

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§ 1 INITIATION OF THE ACTION

Docket Entries

CIVIL DOCKET
UNITED STATES DISTRICT COURT

1a

JUDGE GRIESA

Jury demand date:

73 CIV. 713

D. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
FLM COLLISION PARTS INC., -vs- FORD MOTOR COMPANY, & FORD MARKETING CORPORATION.	For plaintiff: David L. Wasser 250 West 57th Street New York, N.Y. 10019 CI 6-3880 For defendant: SULLIVAN & CROMWELL ~~48 WALL STREET~~ NEW YORK, N.Y. 10005 HA-28100

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
S. 5 mailed X	Clerk		2/15/73	D L Wasser	15 —	
			2/20/73	M STREET		15 —
S. 6 mailed ✓	Marshal					
sis of Action: Anti-Trust olations T.15 U.S.C. 0,000.000	Docket fee					
	Witness fees					
ion arose at:	Depositions					

FLM COLLISION PARTS INC., - v - FORD MOTOR COMPANY

JUDGE

73 CIV. 713

(PG. #2)

DATE	PROCEEDINGS	Date Judgm
Feb.15-73	Filed complaint & issued summons.	
Mar 27-73	Filed stip & order that the time for the deft's to answer the complaint is extended to 5/7/73, So Ordered Griesa J.	
Apr9-73	Filed summons and entered marshal's return served on: Ford Motor Co by Miss Jeanette DeLuca on 3-30-73 and Ford Marketing Corp by Mrs. Frances M. Ryan on 3-8-73.	
May 8-73	Filed defts notice to take deposition of the pltff. on 5/21/73	
May 8-73	Filed deft Ford Motor Co; s ANSWER to the complaint.	S&C
May 21-73	Filed pltffs notice of motion, Re:Preliminary Injunction, ret before Griesa J. on 6/6/73.	
May.16-73	Filed Pltffs objection to notice of depositon.	
May.16-73	Filed Pltffs reply to answer.	
May.16-73	Filed Pltffs answer to request to produce,	
Jun 14-73	Filed stip and order that the time within which defts must respond to pltffs motion is extended 10 days after defts' receipt of pltffs memo of law in support of its motion for a Prelimianry Injunction. So Ordered Griesa J.	
Jun 28-73	Filed stip and order that the time for the deft. to respond to pltffs motion for a Preliminary Injunction is extended 10 days after defts' receipt of pltffs memo of law. So Ordered Griesa J.	
Aug.27-73	Filed Second affdvt. in support of motion for preliminary injunction.	
Sep.17-73	Filed affdvt. of N.J. Rowlands. Re; opposition to pltf. motion for preliminary injunction.	
Sep.17-73	Filed deft. memo in opposition to pltf. motion for prelimianry injunction.	
Oct.2-73	Filed pltffs affdvt and memo in reply to defts memo in opposition.	
Oct. 19-73	Filed defts' memorandum in response to pltff's reply memorandum re:motion for preliminary injunction	
Oct. 19-73	Filed affdvt. of James R. Rose in opposition to motion for preliminary injunction	
Oct. 26-73	Filed pltff's memorandum in reply to deft's 2nd memorandum opposing pltff's motion for a preliminary injunction	
Feb.27-74	Filed pltffs additional memorandum in support of motion for prelim. injunction, ret 3-4-74.	
Mar. 20-74	Filed pltff's 1st set of interrogs. to defts.	
Mar. 25-74	Filed memo endorsed on pltff's motion filed 5-21-73--Motion withdrawn-So ordered-Griesa,J.	
Apr.18-74	Filed defts. Answers and objections to pltfs. interrogatories. (1st.set)	
JUL 12-74	Filed transcript of record of proceedings, dated MARCH 18, 1974.	
Jul 8-74	Filed Findings of Fact & Conclusions of law. (proposed.)	
Jul 11-74	Filed notice of deposition of M. J. Rowlands.	
Aug.22-74	Filed pltffs pretrial memo of law.	
SEPT 23-74	PRE-TRIAL CONFERENCE HELD BY NON-JURY TRIAL BEGUN & CONT'D.	
SEPT 24-74	TRIAL CONT'D	
SEPT 25-74	TRIAL CONT'D.	
SEPT 30-74	TRIAL ADJOURNED TO OCTOBER 7, 1974.	
Oct.1-74	Filed Order permitting defts to take the deposition of David L. Wasser....GRIESA,J.	
OCT 7-74	TRIAL CONT.	
OCT 8-74	TRIAL CONT.	
OCT 9-74	TRIAL CONCLUDED (7 DAYS) JUDGE'S DECISION RESERVED.	
OCT 25-74	Filed transcript of record of proceedings, dated SEP 23, 24, 25, 30 AND OCT 7, 8, 1974	
OCT 31-74	Filed transcript of record of proceedings, dated OCT 9, 1974.	
MAR 5-74	Filed transcript of record of proceedings, dated JAN. 16, 1974	

(CONT'D — PAGE #3)

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS GRIESA, J	Date O Judgmen
-19-75	Filed Opinion No. 43571-for the reasons stated, FLM is entitled to injunctive relief and damages on its claim of price discrimination under Section 2(a) of the Robinson-Patman Act. FLM is entitled to no relief or recovery under its other antitrust claims. Following the completion of the record as to the amount of damages, there will be a supplemental opinion on that subject. GRIESA, J (m-r	
02-09-76	Filed defts' memorandum in opposition to pltff's proposed judgment and injunction and in support of the counter-proposed order, judgment and injunction.	
02-09-76	Filed defts' memorandum in response to pltff's petition for an award of attys' fees and costs.	
02-17-76	Filed deft. Ford Motor Co. notice of taking deposition of David L. Wasser on 02-19-76	
02-17-76	Filed deft. Ford Motor Co. notice of taking deposition of Stuart A. Schlesinger on 02-20-76	
03-02-76	BEFORE GRIESA, J.-- Hearing begun and concluded on damages and attys' fees.	
03-18-76	Filed deposition of David L. Wasser taken on 02-13-76	
03-18-76	Filed continued deposition of David L. Wasser taken on 02-19-76	
03-18-76	Filed deposition of Stuart A. Schlesinger taken on 02-20-76	
03-18-76	Filed transcript of record of proceedings dated 02-09-76	
03-17-76	Filed Supplemental Opinion # 44085-- for the reasons stated, pltff. FLM is entitled to judgment in the amount of $874,506. plus attys' fees in the amount of $135,000. together with costs to be taxed. A judgment and final injunction will be signed and filed today. GRIESA, J. (m/n)	
03-17-76 ✓	Filed Order and Judgment-# 76,230-- that pltff. has failed to make out any claim etc. and pltff's claims are dismissed-- that pltff. has proved its cause of action against deft. Ford Marketing Corp. (now merged into Ford Motor Co.), etc.--pltff. is awarded judgment against the deft. Ford Motor Co. in the am't $874,506.00 together with attys' fees in the am't of $135,000.00 and costs to be taxed-- and that deft. commencing on 4-1-76 shall grant the wholesale incentive allowance to franchised dealers on the resale of crash parts by such dealers to FLM Collision Parts, Inc. on the same terms and conditions as indicated. GRIESA, J. Judgment entered 3-18-76 Clerk (m/n)	
03-19-76	Filed defts' affdvt. and Order to Show Cause why an order staying injunctive relief pending appeal should not be enetered. Ret. 03-22-76. GRIESA, J.	
03-19-76	Filed memorandum in support of deft. Ford Motor Co's motion for stay of order, judgment and injunction.	
03-19-76	Filed defts' notice of appeal to USCA from the final order, judgment and injunction entered on 03-17-76. Copy to: Julien & Schlesinger, P.C. ent. 03-19-76	
03-23-76	Filed Amended Judgment. GRIESA, J. Judgment entered 3-24-76 Clerk (m/	
03-26-76	Filed defts' notice of appeal to USCA from the amended judgment entered on 03-23-76. Copy to: Julien & Schlesinger, P.C. Ent. 03-29-76	
4-3-76	Filed transcript of record of proceedings dated 3-23-76	
04-05-76	Filed affdvt. of David L. Wasser in support of pltff's opposition to deft's motion to stay the injunction.	
04-05-76	Filed pltff's memorandum in opposition to motion for a stay of the injunction pending appeal.	
04-05-76	Filed Supersedas Bond in the sum of $1,120,801.66- American Home Assurance Company	
04-05-76	Filed memo endorsed on OTC filed 03-19-76. The application for stay is excdpthat pending appeal, the requirement of the injunction that Ford send letters to dealers is limited to Pleasantville and Ford. These rulings were made from the bench on the record 3-23-76. This endorsement is for record purposes. So ordered- GRIESA, J. (m/n)	

— OVER —

DATE	PROCEEDINGS
4-9-76	Re-microfilmed opinion #44085 with attached footnotes...
4-2-6-76	Filed petition of plaintiff FLM Collission for the award of a reasonable attorn
4-2-6-76	Filed plaintiff's memo. of law in support of motion to amend and supplement its compl
4-2-6-76	Filed plaintiff's damage calulations.
4-9-76	Filed deposition of the deft. Frod Marketing Corp, by Morris J. Rowlands.
4-9-76	Filed defendant's Affidavit in opposition to petition for attorney's fees and co
4-9-76	Filed plaintiff's supplemental memo. in support of its petition for a reasonable attry
4-12-76	Filed defendantd' trial memorandum.
4-12-76	Filed plaintiff's supplemental trial brief.
4-12-76	Filed plaintiff's pretrial reply memorandum of law.
4-12-76	Filed plaintiff's trial memorandum.
4-12-76	Filed plaintiff's additional trial memorandum.
4-12-76	Filed defendant's post-trial brief.
4-12-76	Filed defendants' supplemental trial memorandum on principles of Schwinn.
4-12-76	Filed defendants' supplemental memorandum in response to plaintiff's petition for an award of attorneys' fees and costs.
4-12-76	Filed affidavit in further support of defendant Ford Motor Co's motion to stay pending the injunction issued in this action on March 17-76.
4-12-76	Filed plaintiff's post-trial brief.
4-12-76	Filed transcript of record of proceedings dtd: Mar. 2-76.
4-12-76	Filed transcript of record of proceedings dtd: Mar. 22-76
4-13-76	Filed pltff's notice of cross-appeal to USCA from the amended judgment entered on 3-23-76. Copy mailed to: Sullivan & Cromwell, Esqs. Int. h-13-76
4-13-76	Filed transcript of record of proceedings dtd: Mar. 11-74.
4-13-76	Filed transcript of record of proceedings dtd: Mar. 2-76.
4-30-76	Filed stipulated facts (Final Pre-Trial Order) dated Sept. 20-74.
5-3-76	Filed stipulation designating exhibits to U.S.C.A.

BEST COPY AVAILABLE

Complaint

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

FLM COLLISION PARTS, INC.,
Plaintiff

-against-

FORD MOTOR COMPANY,

and

FORD MARKETING CORPORATION,
Defendants

- -x

COMPLAINT

FLM Collision Parts, Inc., plaintiff, for its complaint against Ford Motor Company and Ford Marketing Corporation, alleges as follows:

I.

Jurisdiction and Venue

1. This action is instituted under Sections 4 and 16 of the Act of Congress of October 15, 1914, as amended (15 U.S.C. SS 15, 26), known as the Clayton Act, to recover threefold the damages sustained by plaintiff as the result of its being injured in its business and property by reason of defendants' violation of the antitrust laws, and more particularly, of Sections 1 and 2 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. SS 1,2), known as the Sherman Act, and of Sections 2(a), 2(f), 3, 4, 7 and 16 of the Clayton Act (15 U.S.C. SS 13(a), 13(f), 14, 15, 18, 26) and for injunctive relief against threatened loss or damages by defendants' said violations,and also to recover the cost of suit, including a reasonable attorney's fee.

2. At all times relevant to this complaint, the

defendants have been engaged in interstate and foreign commerce and commerce within the meaning of the Sherman Act and Clayton Act. This Court has jurisdiction of this action under 15 U.S.C. SS 15 and 26.

3. At all times relevant to this complaint, the defendants have been licensed to do business and have been doing business within the Southern District of New York and are found, transact business, reside and have agents within the Southern District of New York. The violations of law hereinafter described have been and are being carried out mainly within the Southern District of New York. Venue in this judicial district is proper under 15 U.S.C. SS 15 and 22 and 28 U.S.C. S 1391 (C).

II.

The Plaintiff

4. FLM Collision Parts, Inc. ("FLM") is a corporation organized and existing under the laws of the State of New York, and has its principal office and place of business in the City of Yonkers, State of New York. It is engaged almost fully in the wholesale purchase and sale of genuine Ford body ("crash") parts.

5. "FLM" commenced business in April, 1965 with two officers who were and are now the sole stockholders. For the fiscal year ended September 30, 1965 (6 months), its sales were $81,670 and its net profit before officers' salaries, fringe benefits and taxes was $7,799. Its inventory at 9/30/65 was $4,326.

6. "FLM" obtained a $15,000 loan from the U.S. Small Business Administration during the fiscal year ended

September 30, 1966, and expanded its facitlites. For that year, its sales were $245,739 and its net profit before officers' salaries and taxes was $16,786; its inventory at 9/30/66 was $6,988.

7. For the fiscal year ended September 30, 1971, "FLM's" sales were $654,382, and its net profit before officers' salaries, pension plans and income taxes was $142,025.* Its inventory at 9/30/71 was $60,735.

8. The sales of "FLM" for fiscal year ended September 30, 1972 were $736,967 and its tentative inventory was $82,647. Its staff was now eight.

9. Due to its efficient operation and well-planned system, it has been the intention of "FLM" to set up a franchise operation, or to expand its operation to other areas than its present operating area, and preliminary plans have been discussed and conferences held from time to time on this matter between "FLM's" principals and "FLM's" counsel in this regard.

III

The Defendants

10. Ford Motor Company ("Ford") is a corporation organized and existing under the laws of the State of Delaware, has its principal office and place of business in Dearborn, Michigan and offices and subsidiaries throughout the world. It is and has been engaged in interstate and foreign commerce in the manufacture and sale of automobiles and automotive parts. In 1971, "Ford's" total production of automotive vehicles was 5.02 million, it was the world's

*After payment of surcharges of 5.5 per cent of cost (approximately $25,000) to "Ford" dealers for the authorization to obtain "Ford" parts at wholesale prices.

second largest automotive manufacturer, had a 23.5 per cent share of the United States passenger car market and had approximately 6,700 dealers, many controlled in ownership by "Ford". "Ford" and its subsidiaries had gross sales of $16.43 billion in 1971, with net profits before taxes of approximately $1.31 billion and, for the first nine months of 1972, its sales were a record $14.61 billion, up 22.7 per cent over the same period of the prior year*, and its share of the total U.S. automotive market increased to 25.4 per cent from 23.4 per cent in the like 1971 period. "Ford's" capitalization was $6.68 billion at December 31, 1971, including $5.55 billion in its common stock and surplus accounts.

11. Ford Marketing Corporation ("Ford Marketing") is owned and controlled by Ford Motor Company, and maintains a warehouse at U.S. Highway 46, Teterboro, New Jersey, entitled "Ford - New York Parts Depot", from which depot it makes wholesale sales of "Ford" parts. A depot for orders is also maintained for certain orders at 11871 Middlebelt Rd., Livonia, Michigan.

IV

The Nature of the Violations

12. "FLM" has been a jobber of genuine "Ford" "crash parts", including fenders, hoods, bumpers, deck lids, quarter panels, wheels, radiators and bumpers, providing warehouse facilities for these parts (at more than one location, as required) and technical advice on the ordering of parts by

*For the full year 1972, "Ford" sales reached a record $20.2 billion and earnings a record $870 million after taxes.

its customers, who are chiefly body shops and sometimes automotive dealers. It delivers the parts (92 per cent from its own inventory) by its own trucks chiefly on the same day or the day following the receipt of the telephone orders of customers, and this service together with the technical advice of the officer-managers, who have had more than twenty years experience each in the management and sale of "Ford and Lincoln-Mercury parts, supplies a much needed service to the body shops and the public, generally otherwise unavailable.

13. "FLM" purchases its crash parts from and picks up the parts chiefly from the defendants, but all invoices and credit allowances are sent by defendants to "Ford's" dealers under whose "code" numbers "FLM" has been permitted to receive Ford parts.

14. "FLM" has been purchasing crash parts from defendants and their dealers at a price until recently of approximately 58 per cent of manufacturer's suggested list price; in addition, "FLM" has received an "incentive" credit of approximately 16 per cent of purchases, and one-half of a 5 per cent POPP ("obsolescence") credit allowed by defendants. "FLM" has been paying a charge of 3 per cent of purchases to the dealers under whose "codes" it was permitted to receive the parts.

15. On January 1, 1972, defendants issued a policy manual, bulletin number 900, which bulletin provided for incentives and allowances to "Ford" dealers, and to others, and excluded businesses such as "FLM".

16. In mid-1972, "FLM" was advised by the dealer,

Atlas Lincoln Mercury (formerly Central Lincoln Mercury), of Brooklyn, N.Y., under whose "code" number "FLM" was permitted to receive "Ford" parts, that "FLM" could no longer receive "Ford" parts under said Atlas' code number; therefore, "FLM" arranged to make its purchases under the authority of the code numbers of other "Ford" dealers, who informed "FLM" that under "Ford" policy, the incentive credits of 16 per cent of purchases by "FLM" were no longer allowable to "FLM" or to the dealers, and that "FLM" would have to pay a surcharge of 5 per cent instead of the former surcharge of 3 per cent for the privilege of receiving authority to pick up "Ford" parts at defendants' depot under the dealers' authorization.

17. Because of "Ford's" restrictive and discriminatory policy, prejudicial to "FLM", an established and growing company, "FLM's" cost of purchasing genuine "Ford" parts for sale, increased in mid-1972 to 26.0 per cent over the price available to"Ford" dealers and others favored by "Ford", despite the fact that "FLM" is a significantly larger purchaser of "Ford" crash parts than most, if not all, of these other purchasers. The 26.0 per cent is comprised of the elimination of the 16.0 per cent incentive credit, the surcharge of 5.0 per cent added by "Ford" dealers since "Ford" would not bill to "FLM" direct, and the charge by the "Ford" dealers of one-half of the 5.0 per cent POPP or obsolescence credits allowed to the dealers by "Ford" on purchases of the "crash parts". Prior to these 1972 increases of cost to "FLM" the latter was required throughout its years of operation to pay surcharges to "Ford" dealers for the authorization to obtain "Ford" parts at wholesale prices.

V

Violations Charged

20. Defendants have violated Sections 1 and 2 of the

Sherman Act and Sections 2 (a), 2 (f), 3, 4, 7 and 16 of the Clayton Act in interstate trade and commerce in the sale and distribution of automotive "crash" parts, in that defendants have used their monopoly power in the automotive and automotive parts field to perform acts and enter into agreements and conspiracies with its franchised dealers, subsidiaries and other parties which have

(a) prevented free and fair competition with companies controlled by "Ford", by "FLM" and others in the sale of "Ford" crash parts;

(b) fixed and controlled prices of "Ford" crash parts, in a manner discriminatory to "FLM" and other groups, in violation of the direct public interest,

(c) prevented ready wholesale purchases of genuine "Ford" crash parts by "FLM" and other wholesalers without prohibitive penalties which accrued to the treasuries of defendants or companies and dealers owned and controlled by defendants;

(d) charged prices to "FLM" and other jobbers and wholesalers for "Ford" crash parts on the same basis as retailers, unless the purchasers were controlled or owned by "Ford" or in groups designated by defendants,

(e) acquired capital stock, property and warehouses, directly and indirectly of dealers and other companies throughout the U.S. so that control of replacement of "Ford" crash parts is centralized into defendants.

(f) As a result of all of the foregoing, attempted to monopolize and has monopolized unreasonably and unlawfully restrained trade, and substantially lessened, injured and

destroyed competition in the above commerce of replacement of genuine "Ford" crash parts.

VI

Effects of the Antitrust Violations

21. As a result of the aforesaid monopolizations, attempts to monopolize restraints of trade, acquisitions of dealerships and control of warehousing operations, combinations and illegal pricing arrangements, "FLM" has been severely damaged in its business and property. More specifically, "FLM" has

(a) suffered capital and operating losses;

(b) been deprived of sales and profits which it would have otherwise realized, and reduced from a highly profitable, growing and established company to one operating at a loss;

(c) been precluded from corporate and business growth which it would have otherwise achieved;

(d) lost customers and potential customers;

(e) been placed at a significant and prohibitive competitive disadvantage in the commerce of genuine "Ford" replacement parts;

(f) has had its good-will and value as a going concern and its plans for expansion and franchising obliterated.

22. The full extent of the damages "FLM" has suffered by reason of these violations cannot presently be precisely calculated; however, they are estimated to be not less than $10 million.

23. The aforesaid violations are continuing, and unless enjoined by order of this Court, will continue to cause irreparable harm to "FLM" and others for which there will be no adequate remedy at law.

VII

Prayer for Relief

BEST COPY AVAILABLE

WHEREFORE, the plaintiff prays:

(1) that the aforesaid monopolizations and attempted monopolizations and combinations to monopolize be adjudged and decreed to be in violation of Section 2 of the Sherman Act;

(2) that the aforesaid contracts, combinations, and conspiracies in restraint of trade be adjudged and decreed to be in violation of Section 1 of the Sherman Act;

(3) that the aforesaid acquisitions be adjudged and decreed to be in violation of Section 7 of the Clayton Act;

(4) that the aforesaid tying arrangements be adjudged and decreed to be in violation of Section 3 of the Clayton Act;

(5) that the aforesaid granted and induced price discriminations be adjudged and decreed to be in violation of Sections 2(a), 2(f) of the Clayton Act;

(6) that defendants be adjudged and decreed to have damaged "FLM", by their afore-said monopolistic and discriminatory acts, under Sections 4 and 16 of the Clayton Act;

(7) that the defendants and their officers, agents, directors, employees, successors, and assigns be permantly enjoined and restrained from engaging in each of the unlawful practices herein alleged;

(8) that the defendants be required to divest itself of such of its facilities as the evidence shows is necessary to establish free and open competition in the entire commerce of genuine "Ford" crash replacement parts.

(9) that judgment be entered in plaintiff's favor in

an amount equal to threefold the damages which the evidence shows it has sustained as a result of its being injured in its business and property by reason of defendant's violations of the antitrust laws;

(i) that plaintiff recover the cost of suit, including a reasonable attorney's fee; and

(ii) that plaintiff have such other and further relief as this Court may deem proper.

DAVID L. WASSER
Attorney for Plaintiff
250 West 57th St.
New York, N.Y. 10019

Telephone: (212) Ci 6-3880

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated.

Yours, etc.,
DAVID L. WASSER
Attorney for

Office and Post Office Address
250 West 57th Street
Borough of Manhattan New York, N. Y. 10019

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19
at M.
Dated,

Yours, etc.,
DAVID L. WASSER
Attorney for

Office and Post Office Address
250 West 57th Street
Borough of Manhattan New York, N. Y. 10019

Index No. Year 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FLM COLLISION PARTS, INC.,
Plaintiff

-against-

FORD MOTOR COMPANY,
and
FORD MARKETING CORPORATION,
Defendants

-C O M P L A I N T-

DAVID L. WASSER
Attorney for Plaintiff
Office and Post Office Address, Telephone
250 West 57th Street
Borough of Manhattan New York, N. Y. 10019
Circle 6-3850

To

Attorney(s) for

Service of a copy of the within

Dated, is hereby admitted.

.....

15a

15A

C T SYSTEM

C T Corporation System
The Corporation Trust Company
C T Law Technology, Inc.

SERVICE OF PROCESS TRANSMITTAL FORM

16a

JERSEY CITY, NEW JERSEY
(City) (State)
March 8, 1973
(Date)

TO: Mr. Robert M. Johnson, Office of General Csl. (XX) VIA CERTIFIED MAIL
Ford Motor Company ( ) VIA CERTIFIED AIR MAIL
The American Road ( ) VIA MESSENGER
Dearborn, Michigan 48121

RE: PROCESS SERVED IN NEW JERSEY
(Jurisdiction)

FOR FORD MARKETING CORPORATION DELAWARE
(Name of Company) (Home State)

Confirming telephone conversation with Mr. Johnson's secretary:
Enclosed are copies of legal process served upon the statutory agent of the above company as follows:

1. Title of Action: FLM COLLISION PARTS, INC., Plaintiff vs. FORD MOTOR COMPANY and FORD MARKETING CORPORATION, Defendants

2. Document(s) Served: SUMMONS & COMPLAINT

3. Court: UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
CIVIL ACTION FILE NO. 73 Civ. 713

4. Nature of Action: This action is instituted under Sections 4 and 16 of the Act of Congress of Oct. 15, 1914, as amended (15U.S.C. SS 15, 26), known as the Clayton Act, to recover threefold the damages sustained by plaintiff as result of its being injured in its business and property by reason of ****

5. On Whom Process was Served: THE CORPORATION TRUST COMPANY
Jersey City, N. J.

6. Date and Hour of Service: March 8, 1973 at 2:30 P.M.

7. Appearance or Answer Due: within 20 days after service, exclusive of the day of service

8. Plaintiff's Attorney(s):
DAVID L. WASSER, 250 West 57th St., New York, New York 10019

9. Remarks:
**** defendants' violation of the antitrust laws, etc. Plaintiff prays that defendants and their officers, agents, etc. be permanently enjoined and restrained from engaging in each of the unlawful practices alleged in the Complaint.

KINDLY ACKNOWLEDGE RECEIPT BY SIGNING AND RETURNING TO US THE ENCLOSED CARBON COPY OF THIS TRANSMITTAL FORM.

RECEIVED
MAR 1 [illegible]
ROBERT W. SCOTT
ASSISTANT GENERAL COUNSEL

Signed C T CORPORATION SYSTEM
Per FRANCES M. RYAN
Address 15 Exchange Place
Jersey City, N. J. 07302

NJ290-Y 10-71 100M SETS

Answer of Defendants

17a

ENTERED

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,

Defendants.

- x

73 Civ. 713 (TPG)

ANSWER

Defendants Ford Motor Company ("Ford") and Ford Marketing Corporation, by Sullivan & Cromwell, their attorneys, for their answer to the complaint herein:

1. Admit the allegations of paragraph 1 of the complaint, except deny that they have violated any of the statutory provisions invoked by plaintiff and deny that plaintiff has suffered any injury for which they are liable.

2. Admit the allegations of paragraph 2 of the complaint.

3. Admit the allegations of paragraph 3 of the complaint.

4. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 4 of the complaint, except admit that plaintiff has filed a certificate of incorporation with the Department of State of the State of New York.

5. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 5 of the complaint.

5-7-73

6. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 6 of the complaint.

7. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 7 of the complaint.

8. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 8 of the complaint.

9. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 9 of the complaint.

10. Admit the allegations of the first and second sentences of paragraph 10 of the complaint except state that since July, 1970 defendant Ford has sold automotive parts only to defendant Ford Marketing Corporation which has, in turn, sold these automotive parts to other persons and entities and thereby engaged in interstate and foreign commerce. Deny the allegations of the third sentence of paragraph 10 of the complaint except state that in 1971 Ford's total production of automotive vehicles was approximately 5.02 million, that it was the world's second largest automotive manufacturer, that it had approximately 23.8 per cent of the United States passenger car market and that as of December 31, 1971 it had 6,705 dealers. Admit the allegations of the fourth sentence of paragraph 10 of the complaint except state that Ford's net profits before taxes in 1971 were approximately $1.29 billion. Deny the allegations of the fifth sentence of paragraph 10 of the complaint except

state that as of December 31, 1971 the total of Ford's short-term debt of consolidated subsidiaries, long-term debt payable within one year, long-term debt and stockholders' equity was approximately $6,886.2 million and that as of December 31, 1971 Ford's stockholders' equity was approximately $5,547.2 million.

11. Admit the allegations of the first sentence of paragraph 11 of the complaint and deny the allegations of the second sentence of paragraph 11 of the complaint except state that Ford's Autolite-Ford Parts Division and National Parts Distribution Center maintain an office at 29500 Plymouth Road, Livonia, Michigan.

12. Deny knowledge or information sufficient to form a belief as to the truth or the allegations of paragraph 12 of the complaint except state that plaintiff has purchased Ford parts from one or more Ford or Lincoln-Mercury dealers.

13. Deny the allegations of paragraph 13 of the complaint except state that plaintiff has purchased Ford parts from one or more Ford or Lincoln-Mercury dealers.

14. Deny the allegations of the first sentence of paragraph 14 of the complaint and deny knowledge or information sufficient to form a belief as to the truth of the allegations of the second sentence of paragraph 14 of the complaint.

15. Deny the allegations of paragraph 15 of the complaint except admit that a policy manual bulletin No. 900 dated January 1, 1972 was issued by defendants and incorporate that document by reference for a statement of its contents.

16. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 16 of the complaint.

17. Deny the allegations of the first two sentences of paragraph 17 of the complaint, and deny knowledge or information sufficient to form a belief as to the truth of the allegations of the last sentence of paragraph 17 of the complaint.

18. Deny the allegations of paragraphs 20, 21, 22 and 23 of the complaint.

FIRST AFFIRMATIVE DEFENSE

19. The complaint fails to state a claim upon which relief can be granted.

WHEREFORE defendants demand judgment against plaintiff dismissing the complaint, awarding defendants the costs and disbursements of this action and for such other relief as to this Court shall seem just and proper.

Dated: New York, New York
May 7, 1973

SULLIVAN & CROMWELL

By _____
(A Member of the Firm)

Attorneys for Defendants,
48 Wall Street,
New York, N. Y. 10005.

HAnover 2-8100

CIVIL ACTION NO. 73 Civ. 713 (TPG)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF
NEW YORK

FLM COLLISSION PARTS, INC.,

Plaintiff,

-against-

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

OFFICE COPY
ALWAYS KEEP FLAT
STILLMAN & CROMWELL
48 WALL ST. N.Y.C.

ANSWER

SULLIVAN & CROMWELL
48 WALL STREET, NEW YORK, N. Y. 10005
HANover 2-8100
ATTORNEYS FOR
Defendants

21a

Real Copy 5/2/73
Plaintiff's Exhibit

21A

Plaintiff's Reply to Defendants' Answer

22a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

FLM COLLISION PARTS, INC.,
Plaintiff

73 Civ. 713 (TPG)

REPLY TO ANSWER

-against-

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,
Defendants

- -x

Plaintiff, by its attorney, DAVID L. WASSER, ESQ., replying to paragraph 19 of defendants answer marked "First Affirmative Defense," denies that the complaint fails to state a claim upon which relief can be granted,

WHEREFORE, plaintiff demands judgment as prayed for in the complaint.

Dated: New York, New York
May 14, 1973

David L. Wasser

DAVID L. WASSER, ESQ.
Attorney for Plaintiff,
250 West 57th Street
New York, New York 10019

CIrcle 6 - 3880

TO:
ROBERT MAC CRATE, ESQ.
SULLIVAN & CROMWELL, ESQ.
Attorneys for defendants,
48 Wall Street
New York, New York 10005

5-14-73

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the Clerk of the within named court on 19

Dated,

Yours, etc.,
DAVID L. WASSER
Attorney for

Office and Post Office Address
250 West 57th Street
Borough of Manhattan New York, N. Y. 10019

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19
M.

Dated,

Yours, etc.,
DAVID L. WASSER
Attorney for

Office and Post Office Address
250 West 57th Street
Borough of Manhattan New York, N. Y. 10019

To

Attorney(s) for

Index No. (illegible) Year 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FLM COLLISION PARTS, INC.
PLAINTIFF

-Against-

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,
Defendants

REPLY TO ANSWER

DAVID L. WASSER
Attorney for Plaintiff
Office and Post Office Address, Telephone
250 West 57th Street
Borough of Manhattan New York, N. Y. 10019
Circle 6-3880

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

(illegible) JULIUS BLUMBERG, INC. 80 LAFAYETTE PLACE, N. Y. 10013

COPY RECEIVED

MAY 15 1973

SULLIVAN & CROMWELL
ATTORNEYS FOR

23A

Stipulated Facts and Contentions of the Parties

U.S.D.C.
FILED
APR 23
S.D. OF N.Y.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

73 Civ. 713 (TPG)

~~FINAL PRE-TRIAL ORDER~~
Stipulated Facts

- x

A. STIPULATED FACTS. The parties have stipulated that the following facts are not in dispute:

1. Plaintiff FLM Collision Parts, Inc. ("FLM") is a corporation organized and existing under the laws of the State of New York with its principal place of business in Yonkers, New York.

2. Since its incorporation in April 1965, the major portion of the business of FLM has been the purchasing of Ford, Lincoln and Mercury "crash" parts from franchised Ford and Lincoln-Mercury dealers ("franchised dealers") and the reselling of those parts to others, including independent garages, service stations and repair or "body" shops engaged in automotive service and repair work.

3. Defendant Ford Motor Company ("Ford") is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Dearborn, Michigan and is primarily engaged in the manufacture and sale of automotive vehicles and related parts and accessories.

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4. Ford, Lincoln and Mercury crash parts are manufactured only by Ford or by other manufacturers using dies owned by Ford who make the parts to Ford's specifications and sell them only to Ford and FMC.

5. Ford, Lincoln and Mercury crash parts are used in the repair and replacement of parts on Ford, Lincoln and Mercury vehicles and include fenders, grills, hoods, deck lids, door panels, quarter panels, rocker panels and body side mouldings, all custom-designed and manufactured for particular years and models of vehicle.

6. Crash parts are to be distinguished from other automotive parts (such as batteries, spark plugs and filters) which are manufactured by different manufacturers for use on vehicles of various manufacturers and which are available from the manufacturer of the vehicles in which they can be used and other sources.

7. Defendant Ford Marketing Corporation ("FMC"), a wholly owned subsidiary of Ford, is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Dearborn, Michigan.

8. FMC was organized and incorporated in 1970 and since July 1970 has been engaged in the sale of Ford, Lincoln and Mercury automobiles manufactured by Ford and related parts and accessories manufactured by Ford and others, which functions had previously been performed by Ford itself.

9. Since July 1970 Ford has sold crash parts for Ford, Lincoln and Mercury vehicles (except for export from the United States or directly to the Federal government) only to FMC.

10. FMC at all times has sold crash parts for Ford, Lincoln and Mercury vehicles (except for export from the United States or directly to the Federal government) only to franchised Ford and Lincoln-Mercury dealers for use in their own body shop repair operations and for resale.

11. FMC stocks Ford, Lincoln and Mercury crash parts for all models for at least the five most recent model years and its maintained stock of automotive parts at any time exceeds 240,000 different parts.

12. Approximately 200,000 different automotive parts are available through FMC's National Parts Distribution Center; approximately 42,000 different parts are available through FMC's Master Parts Distribution Centers; and approximately 14,000 different parts are available throught its Class A Depots.

13. FMC distributes automotive parts through three channels of distribution, selling all parts to franchised dealers and selling a limited number of large volume parts (such as batteries, spark plugs and filters) to independent distributors known as direct account warehouse distributors and national accounts, primarily oil and tire companies, as well as to franchised dealers.

14. FMC sells automotive parts to approximately 6,300 franchised dealers, to approximately 1,000 direct account warehouse distributors and to approximately 40 national accounts throughout the United States at prices and on terms published in the Ford and FMC Master Price Lists and in the Policy and Procedure Manual.

15. The Master Price Lists show the prices from time to time for automotive parts sold to franchised dealers,

warehouse distributors and national accounts and show in particular the prices at which parts are sold to franchised dealers acting as retailers from which base prices the prices charged to franchised dealers acting in other capacities are computed.

16. In accordance with the terms and conditions set forth in the Policy and Procedure Manual, the following discounts, allowances and credits are available to franchised dealers with respect to their purchases and sales of parts:

a. Stock order discount;

b. Wholesale incentive allowance;

c. Parts obsolescence protection program credit ("POPP"; permits return of obsolescent parts for full credit of up to 5% of purchases); and

d. Surplus inventory reduction program credit ("SIRP"; permits return of surplus parts for partial credit of up to 3% of purchases).

17. The Wholesale incentive allowance is granted to franchised dealers by FMC in accordance with the terms and conditions set forth in the Policy and Procedure Manual with respect to parts resold by such dealers.

18. The wholesale incentive allowance was initially established for crash parts effective November 1, 1968 at the behest of the Federal Trade Commission.

19. When the wholesale incentive allowance was initially established for crash parts, it was allowed for all resales of such parts by franchised dealers except it was not allowed for parts used in the franchised dealers' own repair and service operations or for parts sold to another franchised dealer.

20. In accordance with a letter notice of June 23, 1971, effective July 1, 1971, the statement of the policy for the wholesale incentive allowance in accordance with the terms and conditions set forth in the Policy and Procedure Manual was amended to limit its allowance for resales by franchised dealers to those situations in which they were selling to persons (other than franchised dealers) engaged in automotive service or repair work.

21. All discounts, allowances and credits with respect to sales by FMC of crash parts are credited or paid directly to the franchised dealers to whom such parts are sold by FMC.

22. FLM has purchased crash parts at various times from 1965 to date from various franchised dealers including the following:

a. Central Lincoln-Mercury ("Central")
Brooklyn, New York
(name changed to Atlas Lincoln-Mercury ("Atlas") in July 1972)

b. Thomas Motors, Inc.
Yonkers, New York

c. Parkview Lincoln-Mercury
Yonkers, New York

d. Pleasantville Ford
Pleasantville, New York.

23. From November 1, 1968 to June 30, 1971, any franchised dealer reselling crash parts to FLM would have been entitled to claim wholesale incentive allowance for any such resales, but effective July 1, 1971, with the amendment of the statement of the policy for the wholesale incentive allowance limiting it to resales made by franchised dealers to persons (other than franchised dealers) engaged in automotive service or repair work, a franchised dealer was no longer entitled to claim the wholesale

incentive allowance for resales to FLM.

24. ~~Subsequent to the enactment of the statement of its policy regulating the wholesale incentive allowance effective~~ AFTER July 1, 1971, Central and Atlas continued to claim credits for wholesale incentive allowance for resales to FLM until November 1, 1972.

25. ~~Subsequent to the enactment of the statement of its policy regulating the wholesale incentive allowance effective~~ AFTER July 1, 1971, FMC continued to give credits for wholesale incentive allowance to Central and Atlas for sales to FLM until November 1, 1972.

26. Since November 1, 1972 no franchised dealer has received credits from FMC for wholesale incentive allowance for resales to FLM.

27. FMC did not recover any portion of the credits for wholesale incentive allowance for resales to FLM by Central and Atlas from July 1, 1971 to November 1, 1972.

28. FMC maintains a Master Parts Distribution Center in Teterboro, New Jersey, for the metropolitan New York area.

29. For all sales by FMC of crash parts it bills the franchised dealer for the purchase price of the parts and the dealer alone is liable to FMC therefor and any risk of non-payment by the dealer's customer is borne solely by the dealer.

30. FLM's sales of Ford, Lincoln and Mercury crash parts have increased each year it has been in business and its gross sales as recorded in its books of account for each of its fiscal years (ending September 30th) have been as follows:

Year	Gross Sales
1965 (six months)	$ 81,670
1966	215,739
1967	337,257
1968	389,987
1969	483,015
1970	620,760
1971	654,382
1972	736,937
1973	798,947

31. This Court has jurisdiction over this action and over the parties.

B. PLAINTIFF'S CONTENTIONS. Plaintiff contends:

1. That effective November 1, 1972, Atlas Lincoln-Mercury at the direction and/or request of the defendants discontinued selling crash parts to FLM, and that prior thereto Atlas raised the price at which it would sell parts to FLM at the direction and/or request of the defendants.

2. That effective June 4, 1973, Thomas Motors, Inc. at the direction and/or request of the defendants discontinued selling crash parts to FLM, and that prior thereto Thomas Motors, Inc. raised the price at which it would sell parts to FLM at the direction and/or request of the defendants.

3. That the defendants under the guise of formulating a policy of so-called incentives, discounts and credits have deliberately undertaken to drive the plaintiff out of business and/or prevent the plaintiff from providing a competitive after market in the sale of Ford crash parts, and that the defendants have undertaken a policy to make it unprofitable for other dealers such as FLM to come into being.

4. That the defendants under the system of so-called incentives, discounts and credits are fixing the prices at which Ford crash parts may be sold in the after market.

5. That the defendants under the guise of a system of so-called incentives, discounts and credits are controlling the prices and/or customers to whom franchised Ford dealers may sell Ford crash parts at times when the franchised Ford dealers have complete title and ownership of the crash parts.

6. That the defendants have attempted and conspired to monopolize and control the after market in Ford crash parts, and the defendants have used their power as the manufacturer of these parts in their effort to control and monopolize the sale of these crash parts in the after market.

7. That the defendants have exercised such control, solicitation and general overseeing of the distribution of Ford crash parts in the after market, including the auditing of the plaintiff's books and records on various occasions so that the plaintiff is an "indirect" purchaser of crash parts from the defendants.

C. DEFENDANTS' CONTENTIONS. Defendants contend that:

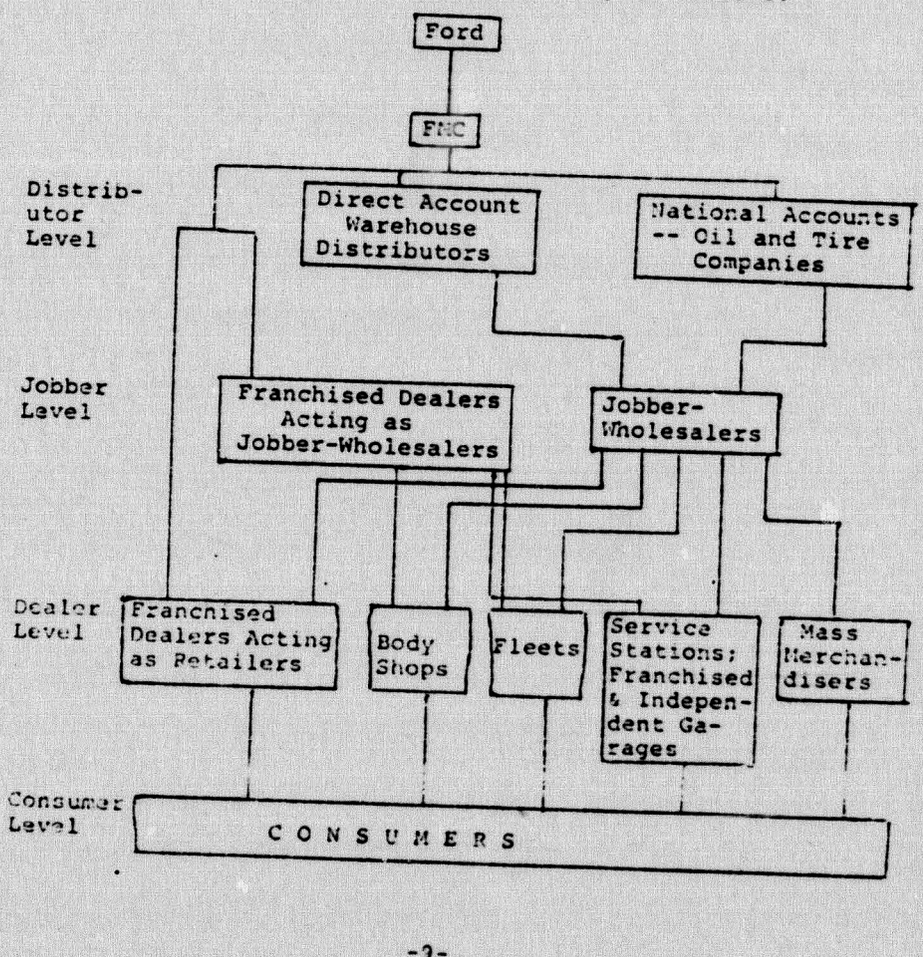
1. With respect to the sale of crash parts by FMC to franchised dealers, neither FMC nor Ford has placed or attempted to place any restriction or control on franchised dealers as to the territory in which they may resell crash parts, the purchasers to whom they may resell [illegible] terms and prices at which they may resell.

2. Ford and Lincoln-Mercury [illegible] dealers who purchase crash parts from FMC are free to resell such parts to anyone, on any terms and at any price they choose.

3. The prices, terms, method and policy of FMC's sales and distribution of automotive parts are established on a uniform basis nationally.

4. The Ford and FMC Master Price Lists and Policy and Procedure Manual provide a functional pricing system for automotive parts based upon the function performed by the buyer in the distribution of the particular parts.

5. The functional levels of distribution for all automotive parts under the Ford and FMC pricing system are accurately presented diagramatically as follows:



6. The wholesale incentive allowance is granted to franchised dealers by FMC in accordance with the terms and conditions set forth in the Policy and Procedure Manual with respect to parts resold by such dealers to body shops, service stations and independent garages in connection with which resales the dealers act as jobber-wholesalers rather than as retailers.

7. The wholesale incentive allowance was initially established for crash parts effective November 1, 1968 at the behest of the Federal Trade Commission to assist independent body shops, garages and service stations in purchasing such parts at prices comparable to those paid by franchised dealers for such parts when used in the franchised dealers' own body shops.

8. When the wholesale incentive allowance was initially established for crash parts, it was allowed in accordance with the terms and conditions set forth in the Policy and Procedure Manual for all resales of such parts by franchised dealers except, in keeping with its theory and objective as conceived by the Federal Trade Commission, it was not allowed for parts used in the franchised dealer's own repair and service operations or for parts sold to another franchised dealer.

9. Franchised dealers individually decide the prices at which they resell and the terms on which they resell crash parts to their customers and they may or may not elect to reflect in whole or in part in their prices and terms of sale any discount, allowance or credit they receive from FMC with respect to their purchases and sales of crash parts.

10. Whether a franchised dealer reflects in its prices or in its terms of sale any portion of any discount, allowance or credit received by it from FMC does not affect the receipt by the franchised dealer of any such discount, allowance or credit.

11. Neither Ford nor FMC controls the election by franchised dealers as to whether or not the prices at which they resell and the terms on which they resell crash parts reflect any discount, allowance or credit received by such franchised dealers from FMC.

12. Although FLM claims that Atlas effective November 1, 1972 discontinued selling crash parts to FLM, neither Ford nor FMC participated in any such decision of Atlas and FMC expr[illegible]ly informed Atlas at the time that Atlas was free to continue selling crash parts to FLM if Atlas chose to do so.

13. Although FLM claims that Thomas Motors, Inc. effective June 4, 1973 discontinued selling crash parts to FLM, neither Ford nor FMC participated in any such decision of Thomas Motors, Inc.

14. Although FLM claims that the franchised dealers from which it has brought crash parts have from time to time changed the terms and prices upon which such sales were made, neither Ford nor FMC participated in any such decisions by franchised dealers to change the terms and prices at which such parts were sold by the franchised dealers.

15. Despite the amendment of the statement of the policy regulating the wholesale incentive allowance effective July 1, 1971, FMC continued to give credits for wholesale incentive allowances to Central and Atlas for sales to FLM

until November 1, 1972 because the responsible personnel of FMC did not realize until October 1972 that Central and Atlas were continuing to claim credits for wholesale incentive allowance for resales for which Central and Atlas were not entitled to claim such credits.

16. When the error in giving credits for wholesale incentive allowance for resales to FLM was discovered by responsible personnel of FMC the granting of such credits was promptly terminated.

17. Although the credits for wholesale incentive allowance for resales to FLM by Central and Atlas from July 1, 1971 to November 1, 1972 had been improperly given, FMC did not recover any portion of the credits for that period from Central and Atlas due to the fact that FMC had failed to act earlier to stop this improper claiming of the wholesale incentive allowance.

18. Although Ford personnel prior to November 1, 1970 examined FLM's records, the purpose of such examinations was to verify the accuracy of the claims for credits for wholesale incentive allowance submitted by Central to FMC and the nature of the relationship between Central and FLM.

19. Customers of a franchised dealer are permitted by FMC to pick up parts which the customers are purchasing from the franchised dealer directly from the Teterboro Master Parts Distribution Center if they have obtained written authority to do so from the franchised dealer from whom the parts are being purchased; however, FMC bills the franchised dealer for any parts thus delivered to the dealer's customer and the dealer in turn obtains payment from its customer.

20. At all times since 1965 FLM has been able to buy crash parts from franchised Ford and Lincoln-Mercury dealers and at no time has it been prevented by defendants from purchasing such parts as it wished to buy.

21. Neither Ford nor FMC has taken any action at any time for the purpose of injuring FLM nor have they committed any acts which have injured FLM.

22. It would work an enormous hardship upon Ford and FMC and disrupt their relationships with the approximately 6,800 franchised Ford and Lincoln-Mercury dealers, were the changes demanded by FLM in the nationwide distribution system for crash parts ordered to be made.

Defendants' Legal Contentions

23. Ford and FMC are entitled to determine the means by which they will sell Ford, Lincoln and Mercury automotive crash parts and it is expressly sanctioned by Section 2(a) of the Robinson-Patman Act and judicial decisions for FMC to limit its sales of such parts to franchised Ford and Lincoln-Mercury dealers.

24. A claim for relief under Section 2(a) of the Robinson-Patman Act may be maintained by a plaintiff only against a defendant from whom plaintiff has actually purchased a commodity; since FLM has never purchased crash parts from the defendants, its complaint fails to state a claim upon which relief can be granted.

25. Under the so-called indirect purchaser doctrine a plaintiff may sue a defendant which sells commodities to it through an intermediary only if plaintiff can demonstrate that it has dealt directly with defendant in purchasing the commodities or that defendant controls the prices, selling policies and selection of customers of the intermediary.

26. The system of discounts, allowances and credits allowed by FMC to franchised dealers on purchases of crash parts and any contacts by defendants with franchised dealers do not amount to an exercise of control by Ford or FMC over the resale of crash parts by franchised dealers or over the terms of such resales to FLM sufficient to satisfy the requirements of the so-called indirect purchaser doctrine.

27. Since defendants have had no solicited dealings with FLM at any time and have exercised no control over the prices, selling policies and selection of customers by the franchised dealers in their sales of crash parts, FLM can make no claim against the defendants under the so-called indirect purchaser doctrine and its complaint fails, also for this reason, to state a claim upon which relief can be granted.

28. Any differences in the resale prices at which Ford, Lincoln and Mercury crash parts are sold by FMC are neither reasonably calculated to lessen competition nor tend to create a monopoly nor tend to injure, destroy or prevent competition and, accordingly, FLM's complaint fails to state a claim on which relief can be granted.

29. Defendants have not entered into any contract, combination or conspiracy in restraint of trade or commerce in Ford, Lincoln and Mercury crash parts.

30. Defendants have not unlawfully monopolized, attempted to monopolize or combined or conspired to monopolize any part of the trade or commerce in Ford, Lincoln and Mercury crash parts.

31. Defendants have not acquired, directly or indirectly, the whole or any part of the stock or other share

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capital or the whole or any part of the assets of any other corporation where, in the line of commerce consisting of the distribution of Ford, Lincoln and Mercury crash parts, the effect of such acquisition might have been substantially to lessen competition or to tend to create an unlawful monopoly.

32. The acts of defendants complained of by plaintiff do not violate the antitrust laws of the United States and defendants are not liable to plaintiff.

33. A voluntary middleman such as FLM in a distribution system for a commodity has no vested right to the protection of the particular role which the middleman has sought to play in distributing the commodity.

34. FLM has established no basis in equity for any injunctive relief against either Ford or FMC.

35. Judgment should be entered in favor of defendants on the merits and dismissing the complaint

* * * * *

The foregoing statement of stipulated facts, plaintiff's contentions and defendants' contentions is submitted by counsel for the Court's consideration.

JULIEN & SCHLESINGER, P.C.

/s/ David Jaroslawicz

Attorneys for plaintiff,
2 Lafayette Street,
New York, N.Y. 10007

SULLIVAN & CROMWELL

Attorneys for defendants,
48 Wall Street,
New York, New York 10005.
(212) 952-8100

Dated:

September 20, 1974
New York, New York

CIVIL ACTION NO. 73 Civ. 713 (TPG)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF
NEW YORK

FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

FINAL PRE-TRIAL ORDER

SULLIVAN & CROMWELL
48 WALL STREET, NEW YORK, N. Y. 10005
(212) 952-8100
ATTORNEYS FOR
Defendants

39a

39A

§2 PLAINTIFF'S PRELIMINARY INJUNCTION MOTIONS

Plaintiff's Notice of Motion for Preliminary Injunction,
May 14, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

FLM COLLISION PARTS, INC.,
Plaintiff

-against-

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,
Defendants

73 Civ. 713 (TPG)

NOTICE OF MOTION

- -x

Sirs:

PLEASE TAKE NOTICE that upon the annexed affidavit of STEPHEN McKEE, Secretary-Treasurer of plaintiff, sworn to May 12th, 1973, and upon all of the pleadings and proceedings had herein, the undersigned will move this Court at a Motion Part hereof, at the United States Courthouse, Foley Square, New York, N.Y., on May 24th, 1973 at 10:00 A.M. or as soon as counsel can be heard, for a preliminary injunction restraining defendants from the continuing, during the pendency of this action, the acts referred to in paragraph 3 of said affidavit.

Yours, etc.

Dated: New York, New York
May 14th, 1973

5/14/73

BY David L. Wilson
DAVID L. WILSON, ESQ.
Attorney for Plaintiff,
250 West 57th Street
New York, New York 10019

CIrcle 6 - 3880

TO:
ROBERT MAC CRATE, ESQ.
SULLIVAN & CROMWELL, ESQ.
Attorneys for defendants,
48 Wall Street
New York, New York 10005

Affidavit of Stephen McKee, Sworn to May 12, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK X

FLM COLLISION PARTS, INC., Plaintiff
-against-
FORD MOTOR COMPANY and
FORD MARKETING CORPORATION, Defendants X

73 Civ. 715 (TPG)
AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

State of New York)
County of Rockland) ss:

Stephen McKee, being duly sworn, deposes and says:

1. He resides at 15 Underwood Road, Monsey, New York, 10952 and is the Secretary-Treasurer and Chairman of the Board of Directors of the plaintiff in the above-entitled action.

2. This is an action under Sections 4 and 16 of the Clayton Act to recover damages and for injunctive relief due to defendants' violations of the Anti-Trust laws;

3. Defendants are continuing the practices discriminatory to plaintiff, as noted in paragraph 17 and elsewhere in plaintiff's complaint; because plaintiff must pay 26.0 per cent over the price available to "Ford" dealers and others favored by "Ford," plaintiff, commencing with the latter part of 1972, is incurring such extra costs in excess of $10,000 per month, the major portion of its gross profit rate has been deleted from its business, due to said discrimination, and it has been forced to obtain temporary, limited outside financing to remain in business, which financing, at best, will not be sufficient to enable plaintiff to stay in business until the culmination of this case.

4. Unless defendants are enjoined and restrained during the pendency of this action from the commission of the acts as above set forth, the plaintiff will suffer great and irreparable damage.

Sworn to before me this
14th day of May, 1973.

DAVID L. WASSER
NOTARY PUBLIC, State of New York
No. 4[illegible]
Qualified in Rockland County
Commission Expires [illegible]

Plaintiff's Memorandum of Law in Support of Motion for Preliminary Injunction, August 24, 1973

Wasser Ex 73

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FLM COLLISION PARTS, INC.,
Plaintiff

-against-

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,
Defendants

73 Civ. 713 (TPG)

MEMORANDUM OF LAW
IN SUPPORT OF MOTION
FOR A PRELIMINARY INJUNCTION

8/24/73

David L. Wasser, Esq.
Counsel for Plaintiff
Office & P.O.Address
250 West 57th Street
New York, N.Y.10019
212 CI 6-3880

cc:
Robert MacCrate, Esq.,
Sullivan & Cromwell, Esqs., Counsel for Defendants
48 Wall Street
New York, N.Y.10005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

FLM COLLISION PARTS, INC.
Plaintiff

- against -

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,
Defendants

- X

73 Civ. 713 (TPG)

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

HON. THOMAS P. GRIESA:

The following memorandum of Law is submitted by the undersigned counsel, David L. Wasser, Esq., on behalf of plaintiff's motion for a Preliminary Injunction.

1. Right of Plaintiff for Injunctive Relief:

"... any person, firm, corporation or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws..." - Clayton Act, Sect. 16, 38 Stat. 737 (1914), 15 U.S.C., Sect. 26 (1970).

2. Probable Success In Action:

The threatened loss and ultimate recovery by plaintiff are indicated in the plaintiff's affidavits submitted in this

matter, which may be proven further by submissions or hearings; the violation of the anti-trust laws by the defendants as evidenced by their actions in dealing with each other, other customers and with plaintiff, and are further indicated by the interest displayed by the Federal Trade Commission in this case, said governmental department having begun an extensive investigation of the defendants' violations, including the sending of investigators to interview plaintiff and others in this matter; a judgment, if entered as a result of the government's case, will be prima-facie evidence in private cases such as this one - Emich Motors Corp. V. General Motors Corp., 340 U.S 558 (1951).

3. Injunctive Relief Not to be Delayed By Proof of Damages:

Despite the substantial provable losses incurred and to be incurred by plaintiff due to defendants' interference with plaintiff's obtaining of Ford crash parts, and defendants' price discrimination against plaintiff and interference with plaintiff's continuing as a wholesale supplier of Ford crash parts despite plaintiff's function as such a wholesaler since plaintiff's formation in 1965, injunctive relief is obtainable even before losses are incurred. In Zenith Radio Corp. V. Hazeltine Research, Inc., 395 U.S. 100, 130 (1969), the court said, in regard to injunctive relief, "... that remedy is

characteristically available even though the plaintiff has not yet suffered actual injury..he need only demonstrate a significantthreat of injury from an impending violation of the anti-trust laws or from a contemporary violation likely to continue or recur."

4. Defendants' Actions, Against Which Injunctive Relief is Sought, are Violations of the Sherman Act (15 U.S.C. Sections 1 and 2), and of the Clayton Act (15 U.S.C. Sections 13 (a), 13(f), 14, 18, 26 and other anti-trust sections:

In their conspiracy with each other and with Ford dealers in price discrimination, in limiting the availability of supplies to the public, in acquiring of control of the capital stock control of customers, in preferential treatment of some customers over others, in the direction of dealers and customers operations after the purchase of Ford crash parts, in their unfair practices, defendants, to the immediate and substantial harm to plaintiff, have created an unfair and monopolistic condition in a very substantial part of the automotive industry:

(a) Ford's Supply Facilities Must be Shared:

If only one facility is available for all competitors, this resource must be shared.

-U.S. V. Terminal Railroad Assn. of St. Louis, 224 U.S. 383 (1912).

-Ganco, Inc. V. Providence Fruit & Produce Building, Inc., 194 F 2d 484 (1st Cir. 1952), 344 U.S. 817 (1952).

Plaintiff performs a needed and valuable wholesale and technological function in the supply and distribution of Ford crash parts, similar, though smaller than defendant Ford Marketing Corporation and similar, though larger, than most Ford dealers, many owned by defendant Ford Motor Co., and the public's interests are harmed by discrimination against plaintiff in price and supply of these parts; these parts at proper wholesale prices may only be obtained from defendants, which control over 25 per cent of the entire automotive industry of the nation.

Sec. 2(a) and 2(b) of the Robinson Patman Act also makes it unlawful to discriminate in price between different purchasers of commodities of like grade and quality..."where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly."...

-Elgin Corp. V. Atlas Building Prod., 251 F 2d 7 (10th Cir. 1958), 357 U.S. 926 (1958).

-Sano Petroleum Corp. V. American Oil Co., 187 F. Supp. 345 (E.D. N.Y. 1960).

-Secatore's Inc. V. Esso Standard Oil Co., 171 F. Supp. 665 (D. Mass. 1959).

-Utah Pie Co. V. Continental Baking Co., 386 U.S. 685 (1967).

(b) Defendants' Franchise Operation Should Not Be Used to Destroy Valid Wholesale Supply of Ford Crash Parts to the Public:

The Ford dealers,franchised basically for the sale of and serving of new autos, are, generally unable to supply wholesale crash parts to body shops as efficiently and promptly as plaintiff; the same day supply to body shops by plaintiff is a factor of the healthy competition intended by the anti-trust laws. Even if power is lawfully possessed in one market (not admitted here, due to other abuses and vertical integration), it may not legally be used to destroy or hinder competition in another market.

-U.S. V. Griffith, 334 U.S. 100 (1948).

-U.S. V. New York Great A.&P. Tea Co., 173 F 2d 79 (7th Cir. 1949).

(c) Defendants Vertical Integration Has Created a Monopoly to the Detriment of Plaintiff and the Public.

Defendant Ford Motor Company's acquisition of the control of ownership of dealers, said defendant's

instructions to said dealers not to sell to plaintiff or to sell to plaintiff without the "incentive credits" previously granted to plaintiff, which credits are essential for plaintiff's wholesale operation, has lessened competition and created a monopolistic condition; this condition has been intensified by said defendant's control of defendant Ford Marketing Corp., which discriminates against plaintiff.

-Clayton Act, Sect. 7, as amended in 1950 (15 U.S.C. Sect. 18), reads:

"... No corporation in commerce shall acquire, directly or indirectly, the whole or any part of the stock or share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

-U.S. V. Continental Can Co., 378 U.S. 441 (1964). Brown ShoeCo. V. U.S., 370 U.S. 294 (1962). Swayne Co. V. Sunkist Growers, Inc., 369 F2d 449 (9th Cir. 1966), 387 U.S. 932 (1967).

Ford Motor Co. V. U.S., 405 U.S. 562 (1972).

(d) Discounts Are Discriminatory Unless Given to All Purchasers of Like Quantity, Etc.

The discounts given to plaintiff are approximately 26 per cent less than those given to purchasers of substantially less quantity.

- FTC V. Morton Salt Co., 334 U.S. 37 (1948)

Mueller Company, FTC DKT. 7514, 60 FTC 120 (1962).

(e) Violations Need Not Be By Express Agreement.

It is sufficient that a concert of action is contemplated and that defendants conform to the arrangement, as in the entire "Ford" set-up.

-U.S. V. Paramount Pictures 334 U.S. 131 (1948).

(f) Ford's Competitive Products Must Be Readily Available to Others.

-U.S. V. Arnold, Schwinn & Co., 388 U.S. 365, 376 (1967)

"Exclusion of traders from the market by means of combination or conspiracy is ... inconsistent with the free-market principles embodied in the Sherman Act."

-U.S. V. General Motors Corp., 384 U.S. 127, 146 (1966).

(g) Defendants' Restriction of Credits and Supplies to Plaintiff by Defendants' Dealers is Illegal:

A seller may advise his customers with respect to any competitive activity, but may not coerce them to conform to his advice.

- Albrect V. Herald Co., 390 U.S. 145 (1968).
Atlantic Ref. Co. V. FTC, 381 U.S. 357 (1965).
U.S. V. Parke, Davis & Co. 362 U.S. 29, 44(1960).
FTC V. Texaco., Inc. 393 U.S. 223 (1968).
U.S. V. Univis Lens Co., 316 U.S. 241 (1942).

The Supreme Court has held that "Once a manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred - whether by explicit agreement or by silent combination or understanding with his vendee - is a per se violation of Section 1 of the Sherman Act."

- U.S. V. Arnold, Schwinn & Co., 388 U.S. 382(1967).

(h) Defendants' Economic Power Must Be Used Equitably:

The Supreme Court has ruled against the exercise of substantial economic power at the manufacturing level to regiment competition at the dealer level.

- Simpson V. Union Oil Co. 377 U.S. 13 (1964)
Atlantic Ref. Co. V. FTC, 381 U.S. 357 (1965)
Columbia Artists Management, Inc. V. U.S., 381 U.S. 348 (1965).

-Poller V. Columbia Broadcasting System, 368 U.S. 464 (1962).

Kiefer Stewart Co. V. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951)

U.S. V. Timken Roller Bearing Co., 83 F. Supp. 284, 311 (N.D. Ohio 1949), 341 U.S. 593 (1951)

Schine Chain Theatres, Inc. V. U.S., 334 U.S. 110 (1948)

U.S. Yellow Cab Co., 332 U.S.218 (1947)

Concluding Note:

The injunction herein prayed for should be granted and the public interest maintained. A company's officers, agents and subsidiaries may not seek by internal concert of action to monopolize either the commerce of customers (Albrecht V. Herald Co., 390 U.S. 145 (1968); U.S. V. Yellow Cab Co., 332 U.S. 218 (1947), or that of competitors (Schine Chain Theatres, Inc. V. U.S. 334 U.S. 110 (1948); White Bear Theatre Corp. V. State Theatre Corp., 129 F 2d 600 (8th Cir. 1942).

As was stated by the Court in Ford Motor Co. V. U.S., 405 U.S. 570 (1972):

"The primary vice of a vertical merger or other arrangement tying a customer to a supplier is that, by foreclosing

the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a "clog on competition..."

Dated: New York, New York
August 23, 1973

Respectfully submitted,

David L. Wasser

DAVID L. WASSER, ESQ.
Attorney for Plaintiff,
250 West 57th Street
New York, New York 10019

Copy to:
ROBERT MAC CRATE, ESQ.
SULLIVAN & CROMWELL, ESQS.
Attorneys for Defendants
48 Wall Street
New York, N.Y. 10005

STATE OF NEW YORK)
ss;
COUNTY OF NEW YORK

Affidavit of Service By Mail

David L. Wasser, being duly sworn, deposes and says, that deponent is not a party to this action, is counsel for plaintiff, is over 18 years of age and has an office at 250 West 57th Street, New York, N.Y.10019, and

That on the 24th day of August,1973, deponent served the within Memorandum of Law and attached papers in this action upon Robert MacCrate, Esq., of Sullivan and Cromwell, Esqs., 48 Wall Street, New York, N.Y.10005, counsel for defendants in this action, at 48 Wall Street. New York, N.Y. 10005, the address designated by said attorney for that purpose, by depositing a true copy of same enclosed in a postpaid, properly addressed wrapper, in an official depositary under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me this
24th day of August,1973

Nathan Ritzer

NATHAN RITZER
Notary Public, State of New York
No. 31-8588150
Qualified in New York County
Commission Expires March 30, 1974

David L. Wasser

Defendant's Affidavits in Opposition to Preliminary Injunction

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FILM COLLISION PARTS, INC.,

Plaintiff,

v.

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,

Defendants.

73 Civ. 713 (TPG)

AFFIDAVIT

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CULLIVAN & CROMWELL
48 WALL ST. NEW YORK, N.Y.

STATE OF MICHIGAN)
SS
COUNTY OF WAYNE)

M. J. ROWLANDS, being duly sworn, says:

1. I am the General Sales Manager, Ford Parts Division, of Ford Marketing Corporation ("FMC"), having held that position since August 1, 1968. In this position I have been fully familiar with the policy and general conduct by Ford Motor Company ("Ford") and FMC of the sale and distribution of crash parts for Ford, Lincoln and Mercury motor cars. This affidavit is submitted in opposition to the plaintiff's motion for a preliminary injunction.

2. FMC was incorporated on July 1, 1970 as a wholly-owned subsidiary of Ford to increase Ford's sales effectiveness, coordinate the marketing, advertising, sales promotion and dealer development activities of the Ford, Lincoln-Mercury and Autolite-Ford Parts Divisions, the latter including the sale of crash parts.

3. Since the formation of FMC in 1970 all crash parts sold by Ford have been sold to FMC which in turn sells all such parts to franchised Ford and Lincoln-Mercury dealers. Prior to the formation of FMC all crash parts sold by Ford were sold by it directly to franchised Ford and Lincoln-Mercury dealers.

4. Neither Ford nor FMC has at any time given any instructions or attempted to exercise any control as to the territory within which the franchised Ford or Lincoln-Mercury dealers may sell crash parts, the customers to whom such dealers may sell crash parts or the price at which crash parts are sold by such dealers. Each franchised dealer determines where, to whom and at what price it will sell crash parts without any limitation by Ford or by FMC.

5. The price at which FMC sells crash parts to franchised dealers depends in part on whether the parts are used by the dealer for its own repair operations or are sold to others, the dealer acting as a wholesaler. On sales of crash parts by FMC to franchised dealers, FMC allows dealers to claim a discount of approximately 25 percent from the FMC suggested list price with respect to parts resold by the franchised dealers to customers engaged in automotive service or repair operations. This discount is known as a "wholesale incentive".

6. The wholesale incentive plan which governs the discounts on the sales to franchised dealers was instituted by Ford on November 1, 1968 at the behest of the Federal Trade Commission. Under the plan as instituted in 1968 a jobber of crash parts was an "eligible customer" and franchised dealers selling to jobbers were thus entitled to claim a discount from FMC for crash parts resold by them to jobbers. On July 1, 1971, FMC redefined its criteria for an "eligible customer" which had the effect of excluding from sales, for which franchised dealers

could claim a discount, sales to jobbers who were not in themselves engaged in automotive service or repair.

7. Despite the change in policy in July 1971 with respect to the eligibility of sales to jobbers for wholesale incentive discounts, due to an oversight on the part of FMC, certain Ford dealers selling crash parts to FLM continued to claim and receive from FMC wholesale incentive discounts with respect to sales to the plaintiff until November 1972.

8. In accordance with the policy of the wholesale incentive plan, no wholesale incentive discount has been granted to any franchised dealers on sales to the plaintiff in this action since November 1972.

M. J. Rowlands

Subscribed and sworn to
before me this 24
day of September, 1973.

ANNA LISICA
Notary Public, Wayne County, Michigan
Acting in Oakland County, Michigan
My Commission Expires October 18, 1975

Notary Public

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

FORD MOTOR COMPANY AND FORD MARKETING CORPORATION,

Defendants.

73 Civ. 713 (TPG)

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
County of Westchester)

WALTER TIVESON, being duly sworn, says:

1. I am the present operator of Thomas Motors, Inc. ("Thomas"), 201 South Broadway, Yonkers, New York, a franchised Ford dealership. I have been the operator of Thomas since May 29, 1973 and in that capacity have been in charge of all of Thomas' activities. I am fully familiar with the relationship between Thomas and the plaintiff in this action since May 29, 1973. This affidavit is submitted in opposition to the plaintiff's motion for a preliminary injunction.

2. Upon assuming control of Thomas, I immediately began to review its business practices and operations, including the sale of parts to FLM Collision Parts, Inc. ("FLM"), the plaintiff in this action. At that time Thomas was selling parts to FLM at 5% over Thomas' net cost, and owed Thomas approximately $30,000.00. I felt that Thomas' margin of profit on its sales to FLM was too low and FLM's outstanding debt to Thomas was too large for future sales on those terms to be a sound business practice for Thomas.

3. On June 4, 1973 I instructed my parts manager to stop selling parts to FLM. The decision to stop selling parts to FLM was entirely my own and was made solely because I felt it would improve the financial condition of Thomas.

4. I called Mr. David Costa, Dealer Development Branch Manager for Ford Motor Company and a member of the board of directors of Thomas, on June 4, 1973 to inform him of my decision to stop selling parts to FLM. I had not discussed parts sales to FLM with Mr. Costa or anyone else from Ford Motor Company or Ford Marketing Corporation prior to my decision to stop selling parts to FLM. I did not call Mr. Costa to seek his approval or even his comments, but only as a courtesy to inform him of my decision.

5. At the time of my decision to stop selling parts to FLM I was not aware that this action by FLM against Ford Motor Company and Ford Marketing Corporation was pending.

Walter Fivoson

Sworn and subscribed to
before me this 13th day of
September, 1973.

Notary Public

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

PIM COLLISION PARTS, INC., Plaintiff, v. FORD MOTOR COMPANY and FORD MARKETING CORPORATION, Defendants	73 Civ. 713 (TPG) AFFIDAVIT

STATE OF MICHIGAN }
COUNTY OF WAYNE } SS

ROBERT W. THOMPSON, being duly sworn, says:

1. I am the Field Services Manager, Ford Parts Division of Ford Marketing Corporation ("FMC") having held that position since December 4, 1972. Since February 2, 1967 I have been fully familiar with the policy and general conduct by Ford and FMC of the sale and distribution of crash parts for Ford, Lincoln and Mercury motor cars. This affidavit is submitted in opposition to the plaintiffs motion for a preliminary injunction.

2. In the operation of its business, Ford distributes crash parts through FMC to approximately 6000 franchised Ford dealers throughout the United States. The method and policy of distribution of crash parts to said franchised dealers are established on a uniform basis nationally.

Robert W. Thompson

Subscribed and sworn to
before me this [illegible]
day of September, 1973.

Notary Public

JO [illegible]
Notary Public, Wayne County, Mich.
My Commission Expires [illegible]

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Defendants' Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction, September 17, 1973

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FLM COLLISION PARTS, INC., Plaintiff,	:	
-against-	:	73 Civ. 713 (TPG)
FORD MOTOR COMPANY and FORD MARKETING CORPORATION, Defendants.	:	

DEFENDANTS' MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

FLM COLLISION PARTS, INC., :

Plaintiff, :

-against- : 73 Civ. 713 (TPG)

FORD MOTOR COMPANY and FORD MARKETING CORPORATION, :

Defendants. :

- - - - - - - - - - - - - - - - - - x

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Defendants Ford Motor Company ("Ford") and Ford Marketing Corporation ("FMC")* submit this memorandum in opposition to plaintiff's motion for a preliminary injunction. Plaintiff's motion should be denied because:

1. The motion is vague and conclusory and nowhere identifies any specific acts of Ford or of FMC which should be enjoined as both the Clayton Act and Fed. R. Civ. P. 65(d) require.

---

* Both defendants are herein sometimes collectively referred to as "Ford".

2. Plaintiff makes no showing either as to its probability of success on the merits or as to any irreparable injury it will sustain sufficient to warrant the extraordinary relief of a preliminary injunction.

3. Plaintiff's procrastination in making the present motion completely belies its claim that relief pendente lite is necessary or appropriate.

FACTUAL BACKGROUND AND PRIOR PROCEEDINGS

This is a civil action for damages and injunctive relief for alleged violations of the antitrust laws.

Plaintiff FLM Collision Parts, Inc. ("FLM") is a middleman-jobber of Ford and Lincoln-Mercury "crash parts". Defendant Ford manufactures* those parts and sells them to defendant FMC, a wholly owned subsidiary of Ford. FMC sells crash parts only to franchised Ford dealers who are free to sell them at any price to any customer. The price which FMC charges the Ford dealers for crash parts depends, in part, on whether the parts are used by the Ford dealer for its own repair operations or sold to others when the Ford dealer acts as a "wholesaler"

* In some cases Ford purchases crash parts from independent manufacturers. When it does so it furnishes the dies used to the manufacturer of the parts and the parts are produced for Ford and to its specifications.

of such parts. Sales by Ford dealers, acting as wholesalers, to customers engaged in automotive service or repair operations make the dealer eligible for a "wholesale incentive" -- a discount of approximately 26% from FMC's list price. (Rowlands Aff't. ¶ 5). Whether or not a dealer is entitled to receive this discount depends on the functional role his customer plays in the distribution of parts. However, the dealers have always been absolutely free to sell crash parts to any customer and at any price. Neither Ford nor FMC places any restrictions on the sale of these parts once they have been sold to a dealer. (Rowlands Aff't. ¶ 4).

Ford's Wholesale Incentive Plan, which governs these discounts, was instituted on November 1, 1968 at the behest of the Federal Trade Commission. Under the plan as instituted in 1968 plaintiff was an "eligible customer" and the various Ford dealers from whom it purchased crash parts were thus eligible to claim a discount from FMC for crash parts sold to plaintiff. On July 1, 1971 Ford redefined its criteria for an "eligible customer" which had the effect of excluding from sales for which Ford dealers could claim a discount sales to customers such as FLM.* (Rowlands Aff't. ¶ 6). Despite this change in

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* One of the revisions to the Wholesale Incentive Plan instituted in July 1971 was the addition of a new category of "ineligible sales" which included FLM: "Sales to any customer NOT engaged in automotive service or repair work except export agencies . . . ."

Ford policy, due to an oversight on the part of Ford, until November 1, 1972 certain Ford dealers selling crash parts to FLM continued to claim and receive from FMC wholesale incentives with respect to sales to FLM. (Rowlands Aff't. ¶ 7).

FLM's basic complaint relates to this change in Ford policy. Under Ford's Wholesale Incentive Plan its dealers have always been free to resell the parts to whomever they please at whatever price they please. During the period November 1968 to November 1972 FLM claims that it arranged with certain Ford dealers to buy crash parts from the dealers at a discounted price which reflected a discount of roughly the equivalent of the 26% wholesale incentive which dealers could claim from FMC on sales to eligible customers. Since November 1, 1972, FLM's suppliers have, according to the complaint, increased the prices they charge FLM for crash parts. FLM, which never hesitated to accept the indirect benefits it received under the original Wholesale Incentive Plan, now charges that the plan -- which was instituted at the behest of the FTC to improve the position of independent body repair shops -- violates § 2(a) of the Robinson-Patman Act and that Ford's method of distributing crash parts as a whole violates §§ 1 and 2 of the Sherman Act, §§ 3 and 7 of the Clayton Act and § 2(f) of the Robinson-Patman Act.

FLM instituted this action on February 15, 1973, three and one-half months after it claims that its sellers raised their prices to it on crash parts. On May 14, 1973, six and one-half months after the alleged change in pricing occurred, plaintiff first filed its motion for a preliminary injunction which was then withdrawn as incomplete. Thereafter, on August 24, 1973, nearly ten months after the dealers are alleged to have changed their pricing of crash parts to FLM, plaintiff sought to complete and file its application for a preliminary injunction, but even now it fails completely to identify any specific acts of Ford or of FMC which it seeks to have enjoined.

Argument

1. Plaintiff's motion is vague and conclusory and fails to set forth any cognizable reason for the issuance of an injunction or to identify any acts to be enjoined as both the Clayton Act and Fed. R. Civ. P. 65(d) require. Plaintiff's "Notice of Motion" asks that defendants be enjoined from continuing "the acts referred to in paragraph 3 of [Mr. McKee's first] affidavit." Paragraph 3 of the affidavit, in turn, states that "defendants are continuing the practices discriminatory to plaintiff, as noted in paragraph 17 and elsewhere in plaintiff's complaint" (emphasis added) and goes on to state that plaintiff therefore must pay more for the parts it purchases

from dealers -- not from either defendant, as noted above -- than it did prior to November, 1972. Paragraph 17 of the complaint summarily states that "because of 'Ford's' restrictive and discriminatory policy ... 'FLM's' cost of purchasing genuine 'Ford' parts [has] increased...."

Plaintiff's motion papers are, in reality, nothing more than a series of references to other papers which ultimately incorporate by reference the conclusory allegations of the complaint. It is impossible to determine from plaintiff's application either the acts and practices of defendants which have allegedly injured plaintiff or the terms of the injunction plaintiff seeks. To the questions "What acts has either defendant committed which have injured plaintiff?", "What acts shall be enjoined?" and "Against whom shall the injunction be issued?" plaintiff has provided no intelligible answer.

Plaintiff's papers are totally inadequate to support its application for the extraordinary relief it requests. Based on plaintiff's application no court could comply with either Fed. R. Civ. P. 65(d) or Section 19 of the Clayton Act from which the language of Rule 65(d) was drawn. Rule 65(d) provides:

> "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained...."

Professor Moore comments: "These provisions ... are couched in mandatory terms. They apply to ... every injunction [and] should be scrupulously observed." 7 Moore's Federal Practice ¶ 65.11 at 65-101 (2d ed. 1972). Plantiff, however, has made it impossible for the Court to comply with Rule 65(d) by failing to specify either the reasons for or the acts to be restrained by the injunction it seeks.

Even where facts and reasons justifying injunctive relief have been demonstrated, it is imperative that the acts to be restrained are identified with specificity. As the Supreme Court stated in Schine Chain Theatres, Inc. v. U.S., 334 U.S. 110 (1948):

> "Appellants object to the generality of the injunction against 'monopolizing' first- and second-run films. The statutory requirement [of the anti-trust laws] is that these injunctions 'shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained.' 38 Stat. 738, 28 U.S.C. § 383. And see Fed. R. Civ. P. 65(d) ... [W]e think the public interest requires that a more specific decree be entered on this phase of the case. The precise practices found to have violated the [Sherman Act] should be specifically enjoined."

334 U.S. at 125-226. Accord, 7 Moore ¶ 65.11 at pp. 65-106 to 65-108. And in discussing the requisite specificity of antitrust injunctions in Hartford-Empire Co. v. U.S., 323 U.S. 386 (1945), the Supreme Court similarly declared:

> "This is not to say that a decree need deal only with the exact type of acts found to have been committed [Ethyl Gasoline Corp. v. U.S., 309 U.S. 436, 461 (1940)]... or may not prohibit acts which in another setting would be unobjectionable ... [but] the decree must not be 'so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt'; enjoin 'all possible breaches of the law' [Swift & Co. v. U.S., 196 U.S. 375, 396 (1905)]; or cause the defendants hereafter not 'to be under the protection of the law of the land.' [New York, New Haven & Hartford R. Co. v. I.C.C., 200 U.S. 361, 404 (1906)]."

323 U.S. at 409-410.

Plaintiff has simply not told the Court what it wants or why it is entitled to any specific injunction. Scrutiny of its motion papers discloses that no evidence of any wrongdoing by defendants is offered, and the motion papers do nothing more than ask the Court to accept as true all the conclusory allegations of the complaint without offering one whit of substantiation for them. Plaintiff then asks that defendants be "enjoined and restrained during the pendency of this action from the commission of the acts as set forth [in ¶ 3 of the First McKee Aff't]...." (First McKee Aff't, ¶ 4); in short, that the complaint in its entirety be incorporated into the Court's decree. No such procedure is authorized by law nor warranted in fact by any specific allegation in the complaint. Plaintiff's motion is totally deficient on its face.

2. Plaintiff has not sustained the burden of proof for any of the elements of a meritorious claim for a preliminary injunction. A preliminary injunction is a remedy of "drastic power" which the Court should grant only with "great reluctance". Sherman v. Posner, 266 F. Supp. 871, 873 (S.D.N.Y. 1966). Before any such extraordinary relief may be granted, the moving party must clearly explain the specific relief he seeks and demonstrate three things:

(a) a fair chance of success on the merits of the action;

(b) irreparable injury if the specific relief is not granted; and

(c) that the harm which defendants would suffer as a result of granting relief to plaintiff is not greater than the harm which is to be averted. Sherman v. Posner, supra. Accord, Thompson v. New York Central Rr. Co., 361 F.2d 137, 145-46 (2d Cir. 1966); Hall Signal Co. v. General Ry. Signal Co., 153 F. 907 (2d Cir. 1907); cf. Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738 (2d Cir. 1953). Plaintiff has demonstrated none of those factors.

(a) Plaintiff fails to demonstrate that it has a fair chance of success on the merits. Despite the plethora of statutory sections cited by plaintiff in its

memorandum, factual allegations, with one minor exception*, relate only to plaintiff's claim under Section 2(a) of the Robinson-Patman Act. This section provides, in pertinent part:

> "[I]t shall be unlawful for any person engaged in commerce, in the course of such commerce, directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quantity ... where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly ... provided ... that nothing contained herein shall prevent persons engaged in selling goods ... from selecting their own customers in bona fide transactions and not in restraint of trade...."

There is a serious defect in plaintiff's complaint: it falsely alleges that "'FLM' purchases its crash parts from ... defendants." (Compl. ¶ 13) (emphasis added) and in ¶ 17 alleges that Ford has discriminated in price between "'Ford' dealers and others favored by 'Ford'" on one hand and FLM on the other. In fact, as pointed

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* Paragraph (1) of plaintiff's Second Affidavit alleges "on information and belief" that defendants "[have instructed] Thomas Motors, Inc., a Ford dealer, the controlling interest in which is in Ford Motor Company, to cease its supply of said parts to plaintiff..." This allegation might conceivably relate to plaintiff's claims under the Sherman Act, if proven. However, no direct evidence of any such conduct on the part of either defendant has been presented. Moreover, defendants in the answering affidavits of Mr. Fiveson refute Mr. McKee's "belief" and show that no such instructions were given to Thomas Motors, Inc. (Fiveson Aff't.).

out above (p. 2) and in defendants' answer to the complaint (¶¶ 13, 17), neither defendant has ever sold crash parts to FLM. Defendants have sold crash parts only to Ford dealers, and plaintiff has purchased its parts only from Ford dealers.

It is settled that a claim for relief under Section 2(a) may be maintained only by a plaintiff to whom defendant has made a sale. "The decisions of many cases have crystallized the rule that an individual can have no cause of action under Section 2(a) . . . unless he is an actual purchaser from the person charged with the discrimination." Klein v. Lionel Corp., 237 F.2d 13, 14-15 (3d Cir. 1956) (footnote omitted); accord, Naifeh v. Ronson Art Metal Works, Inc., 218 F.2d 202, 206 (10th Cir. 1954); Chicago Seating Co. v. S. Karpen & Bros., 177 F.2d 863 (7th Cir. 1949); Shaw's, Inc. v. Wilson-Jones Co., 105 F.2d 331 (3d Cir. 1939). "[O]ne cannot have a cuase of action for a violation of [§ 2(a)] unless one is an actual purchaser from the person charged with discrimination." Baim & Blank, Inc. v. Philco Corp., 148 F. Supp. 541, 543 (E.D.N.Y. 1957). Since plaintiff has never purchased crash parts from either defendant, the complaint fails to state a claim upon which relief can be granted.

Nor can plaintiff rely on the "indirect purchaser" doctrine first articulated by the Federal Trade Commission in Kraft-Phenix Cheese Corp., 25 F.T.C. 537 (1937). In every FTC or judicial proceeding in which the doctrine has been applied, plaintiff has been required to show that defendant had some direct contact with plaintiff, control over the prices, policies or selection of customers of the intermediary between plaintiff and defendant or exercised some similar power over the goods in question once they had, in theory, been sold to the intermediary. F. Rowe, Price Discrimination Under the Robinson-Patman Act, § 4.5 at 57-59 (1962 ed.) and cases cited therein. The leading case on the indirect purchaser doctrine in this Circuit is American News Co. v. FTC, 300 F.2d 104 (2d Cir.), cert. denied, 371 U.S. 824 (1962), in which the Court of Appeals stated at p. 109:

> "If the manufacturer deals with a retailer through the intermediary of wholesalers, dealers, or jobbers, the retailer may nevertheless be a 'customer' or 'purchaser' of the manufacturer if the latter deals directly with the retailers and controls the terms upon which he buys. K.S. Corp. v. Chemstrand Corp., supra; Champion Spark Plug Co., 50 F.T.C. 30; Dentists Supply Co. of New York, 37 F.T.C. 345; Kraft-Phenix Cheese Corp., 25 F.T.C. 537. Cf. Elizabeth Arden, Inc. v. F.T.C., 156 F.2d 132 (2d Cir.), cert. denied, 331 U.S. 806...."

But here the complaint contains no allegations of such conduct, and the affidavit of Mr. Rowlands establishes that neither Ford nor FMC has had any such contact with FLM* or exercised any control over the price at which crash parts are sold by Ford dealers or the selection of customers by Ford dealers. In short, plaintiff neither alleges nor offers evidence of any conduct by defendants actionable under the indirect purchaser doctrine.

Defendants have customarily sold crash parts only to Ford dealers. This choice of customers is expressly sanctioned by Section 2(a) and has been sustained by the courts for more than 50 years. Bruce's Juices v. American Can Co., 330 U.S. 743 (1946); U.S. v. Colgate & Co., 250 U.S. 300 (1919); Loran Specialty Mfg. Co. v. Clark Mfg. Co., 360 F.2d 913 (7th Cir.), cert. denied, 385 U.S. 956 (1966); Chicago Sugar Co. v. American Sugar Refining Co., 176 F.2d 1 (7th Cir. 1949). The inclusion, as exhibits, of plaintiff's attorney's two letters to Ford and Ford's attorneys relating to the possibility of Ford selling crash parts to FLM are therefore entirely irrelevant regardless of how Ford might view such a request from plaintiff.

Absent an actual purchase of crash parts by FLM from defendants or any evidence that would suggest the applicability of the indirect purchaser doctrine,

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* The only direct contacts between FLM and Ford have been occasional examinations of FLM's records of purchases and sales of parts by Ford's auditors as a check on dealers' claims for wholesale incentive payments for parts sold to FLM prior to November 1, 1972.

the complaint fails to state a claim upon which relief can be granted with respect to the Robinson-Patman Act.

However, even if the Court believes that it is premature to dismiss plaintiff's claim under Section 2(a), plaintiff's motion for a preliminary injunction must be denied for its total failure to demonstrate that it has a "fair chance of success on the merits". Much of plaintiff's memorandum in support of its motion merely repeats the text of the statutory sections upon which it relies or general allegations of the complaint, adding nothing at all to its argument that an injunction should issue.

Plaintiff's error in supposing it has standing to sue under Section 2(a), despite the fact that it has never purchased crash parts from either defendant is compounded by its failure to demonstrate anywhere in its entire memorandum a fair chance of success on the merits. Thus plaintiff's arguments entitled "Ford's Supply Facilities Must Be Shared" (pp. 3-5) and "Discounts Are Discriminatory Unless Given to All Purchasers of Like Quantity, Etc." (pp. 6-7) assume sub silentio that plaintiff has purchased parts from one or both of the defendants, which simply is not so.

The wide-ranging citation of leading antitrust precedents without relation to the facts of this case add nothing to plaintiff's presentation. Thus, plaintiff's citation (memorandum, p. 4) of U.S. v. Terminal R. Ass'n of St. Louis, 224 U.S. 383 (1912), and Gamco, Inc. v. Providence Fruit & Produce

Building, Inc., 194 F.2d 484 (1st Cir.), cert. denied, 344 U.S. 817 (1952), are equally inapposite. Both these cases involved large physical facilities for commercial activity--a railroad terminal and a produce market, respectively--which were, as a practical matter, incapable of duplication, and from which defendants' competitors had been or might be excluded. No such consideration can conceivably be said to govern the distribution of a manufacturer's own products as long as those products are, at some point in their distribution, available to any willing purchaser. FLM is still buying Ford parts from Ford dealers (Second McKee Aff't, ¶ 2) and cannot be heard to complain that it cannot purchase Ford parts. It can.

On the other hand, cases cited by plaintiff (memorandum, pp. 4-5) in support of its Robinson-Patman Act claims actually lend support to defendants' position that the instant claim is without merit. In Elgin Corp. v. Atlas Building Products Co., 251 F.2d 7 (10th Cir.), cert. denied, 357 U.S. 926 (1958), the Court of Appeals affirmed a jury verdict for the defendant, commenting: "[Section 2(a)] does not have the effect of making any and every differential in price . . . illegal price discrimination . . . the Act concerns itself with the price discrimination which is reasonably calculated to lessen competition, or tends to create a monopoly, or to injure, destroy or prevent competition . . .

and the burden rest[s] upon plaintiff to establish price discrimination of that kind and character." 251 F.2d at 11 (citations omitted). Sano Petroleum Corp. v. American Oil Co., 187 F. Supp. 345 (E.D.N.Y. 1960), quotes extensively from plaintiff's third case, Secatore's, Inc. v. Esso Standard Oil Co., 171 F. Supp. 665 (D. Mass. 1959). Both stand for the proposition that "a supplier may discriminate in price between a retail customer and a consumer customer, giving a lower price to the latter . . . ." 187 F. Supp. at 354.

> "'Clearly there would be no discrimination if defendant sold to these ultimate consumers at the same price at which it sells to plaintiff. But even then plaintiff could not compete with defendant for their business for it would as a matter of practical economics have to charge them more than it paid defendant . . . to cover the expenses of its operation, to say nothing of making a profit . . . . Defendant is under no obligation to sell to plaintiff at a lower price than it charges to consumers who buy directly from it in order to enable plaintiff to compete with it for the business of those customers."

171 F. Supp. at 667 quoted in 187 F. Supp. at 354 (emphasis added).* Plaintiff's fourth citation, Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967), is a case of primary-line injury involving predatory geographic pricing obviously irrelevant to anything in the present case.

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* The language of these cases would support the position of a Ford dealer who sold at different prices to FLM and an independent body repair shop if such a dealer were named as a defendant in this action. But since neither defendant in this action sells crash parts to FLM, as noted above, these citations are simply irrelevant.

Plaintiff's argument captioned "Defendants' Franchise Operations Should Not Be Used to Destroy Valid Wholesale Supply of Ford Crash Parts to the Public" (p. 5) and its citations of U.S. v. Griffith, 334 U.S. 100 (1948) and U.S. v. New York Great Atlantic & Pacific Tea Co., 173 F. 2d 79 (7th Cir. 1949), are based on an assertion not found in the instant complaint: that franchised Ford dealers (not the defendants) are somehow using their power in one market--"the sale of and serving [sic] of new autos"-- to hinder competition in the crash parts market. This involves no claim for relief against either defendant.

The argument captioned "Defendants' Vertical Integration Has Created a Monopoly to the Detriment of Plaintiff and the Public" (pp. 5-6) is equally baffling. Of which dealers has Ford acquired control in violation of § 7 of the Clayton Act? How does the creation, from scratch, of a wholly owned subsidiary (FMC) by a manufacturer (Ford) to serve as the distributor of its parts violate § 7's ban on acquisitions?

The answer to FLM's argument that "Ford's Competitive [sic] Products Must Be Readily Available to Others" (memorandum, p. 7) is that they are, if FLM is referring to crash parts when it uses the phrase "Competitive Products". FLM has never been denied the right to buy crash parts by either defendant, and FLM admits that it is still purchasing the parts from a Ford dealer (Second McKee Aff't ¶ 2). Equally irrelevant is plaintiff's citation of

U.S. v. Arnold, Schwinn & Co., 388 U.S. 365 (1967). That case dealt with territorial and customer restraints, and there is no allegation that any defendant has ever told the Ford dealers, to whom defendants sell these parts, not to sell the parts outside any geographic area or not to sell the parts to any particular class of prospective purchasers. Ford dealers are free to sell crash parts wherever and to whomever they please.

FLM's next argument (memorandum, p. 8) suffers from the same irrelevancy. Neither Ford nor FMC has instructed Ford dealers to sell crash parts only within a certain territory, only to certain customers or only at a certain price (Rowlands Aff't. ¶ 4). These matters are left entirely to the dealers.

Plaintiff's last capsule argument (memorandum, p. 8)--"The Supreme Court has ruled against the exercise of substantial economic power at the manufacturing level to regiment competition at the dealer level"--may be quite true, but plaintiff has made no showing, or even any allegation, that this proposition has anything to do with the facts of this case.

Moreover, the quantity and quality of the evidentiary material proffered by plaintiff in support of its motion is woefully inadequate. Plaintiff's evidence consists of four documents: two one-page affidavits of one of FLM's corporate officers and two brief letters from plaintiff's

counsel, one to defendants' attorneys and one to defendant. The substance of these documents is nil. The affidavits are mere recitals of conclusory statements and impressions of plaintiff's secretary-treasurer without any reference to the underlying facts. The legal arguments in plaintiff's memorandum are meaningless in the absence of any factual showing of a basis for relief. There is nothing before the Court to suggest that plaintiff can prevail in this case on the merits.

b. The record is barren of any showing of irreparable injury. Plaintiff asserts that its cost of parts purchased from Ford dealers has increased since November, 1972. No evidentiary facts are presented to show either the extent or the effect of such charges upon plaintiff. There is no indication of what pricing policy plaintiff has followed. If a monetary loss to plaintiff is ultimately found after trial on the merits to have been caused by defendants' conduct and if that conduct is found to have violated the antitrust laws, monetary damages could be awarded to plaintiff. But the mere fact that plaintiff's profits are no longer as large as they once were is not a sufficient ground for the issuance of a preliminary injunction.

Plaintiff roundly alleges that it will not be able to stay in business until a final judgment is rendered in this action. (First McKee Aff't. ¶ 3). However, the record falls far short of any such demonstration. We are asked in effect

to take the plaintiff's word for it: "[P]laintiff, commencing with the latter part of 1972, is incurring ... extra costs in excess of $10,000 per month, the major portion of its gross profit rate has been deleted from its business, due to said discrimination [by defendants], and it has been forced to obtain temporary, limited outside financing to remain in business, which financing, at best, will not be sufficient to enable plaintiff to stay in business until the culmination of this case." (First McKee Aff't. ¶ 3). This conclusory statement by the plaintiff's secretary-treasurer is all that plaintiff has seen fit to provide. Absent financial records or any factual detail to support Mr. McKee's conclusory statement that FLM will go out of business, his statement must be regarded at best as nothing more than the expression of an unsubstantiated opinion. One would assume that if FLM had, in fact, been on a collision course with insolvency since last November that some sort of evidence of that situation would by now have been mustered and presented to the Court.

Plaintiff's failure to offer any evidence of irreparable injury is a necessary and sufficient ground for denial of its motion. However, defendants through their pre-trial discovery have obtained access to FLM's financial records, and are able to offer affirmative proof that FLM has in fact been operating since November 1, 1972 at a profit and with no

decrease in its sales volume.

FLM in its financial records defines "gross profit" as sales less cost of parts sold. FLM's "gross profit margin" is then defined as gross profit divided by sales. For three and one-half years, from April 30, 1965 to September 30, 1968, FLM continually expanded its operations on the following gross profit margins:

1965 (six-month period)	18.2%
1966	18.1%
1967	18.1%
1968	17.0%

Source: FLM's "Statements of Operating Results" (Appendix A to Carrad Aff't.).

No financial statements have been prepared for FLM which reflect its financial condition since September 30, 1972. However, FLM does keep a daily record of the cost of parts and sales. Since December, 1972 these figures reflect the following gross profit margins:

(1) Month	(2) Cost*	(3) Sales	(4) Gross Profit	(5) Gross Profit Margin
12/72	$50,538.06	$60,550.13	$10,012.07	16.6%
1/73	60,146.62	71,654.31	11,507.69	16.2%
2/73	55,430.34	66,599.02	11,168.68	17.8%
3/73	55,955.29	67,240.19	11,284.90	17.8%
4/73	55,044.78	65,877.22	10,832.44	16.6%
5/73	60,978.77	73,220.76	12,241.99	16.8%

Source: FLM's Daily Journal (Appendix B to Carrad Aff't.).

* These figures are 3% higher than the figures actually shown in FLM's Journal. Both David L. Wasser, plaintiff's accountant as well as its attorney, and Mr. McKee have stated that the higher figure represents the actual cost of the parts to FLM and defendants have so assumed for the purpose of this memorandum. (Carrad Aff't. ¶ 4).

Nor have FLM's total sales shown any appreciable decline since November, 1972. The following table sets forth the highest and lowest monthly sales figures for comparable periods of time in the last three years:

November to May	High	Low
1970-71	$70,971.17	$49,394.61
1971-72	$72,376.44	$59,514.09
1972-73	$73,220.76	$60,550.13

Source: FLM's Daily Journal (Appendix B to Carrad Aff't.).

Thus it is apparent that FLM's sales volume has not been adversely affected by any change in the prices paid by it after November, 1972.

From these figures the following conclusions may appropriately be drawn:

1. FLM's total sales have not been adversely affected since November, 1972 -- in fact, they have increased slightly.

2. FLM's gross profit margins since November, 1972 have been almost identical to the gross profit margins upon which it operated for three and one-half years in 1965-1968. FLM is actually earning an amount of gross profits from two to three times higher than in 1965-1968 because its present sales volume is from two to three times higher than the

average monthly sales volume for that period.*

FLM's net profits have always been kept at a minimum because its two shareholders, officers and directors, Messrs. McKee and Andidero, have taken a substantial portion of FLM's gross profits as officers' salaries:

	Officers' Salaries	% of Gross Profits
1965 (six-month period)	$ 7,200	48.6%
1966	16,680	38%
1967	23,520	38.5%
1968	26,520	40%
1969	31,660	23%
1970	62,400	35.5%
1971	83,200	40%
1972	83,200	37%

Source: FLM's "Statements of Operating Results" (Appendix A to Carrad Aff't.).

Defendants do not suggest that FLM's operations have been untouched by occurrences since November 1972. In fact, FLM's gross profit margins nearly doubled in 1968-1972 while the dealers which sold crash parts to FLM received wholesale incentives from Ford. In fact, FLM's gross profit margins as a middleman rose from 17-18% in 1965-1968 to 28.6% in 1969, 28.3% in 1970, 31.5% in 1971 and 30.5% in 1972. Since

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* Average monthly sales volume

1965 (six months)	$13,611.58
1966	20,478.24
1967	28,104.75
1968	32,498.96

Source: FLM's "Statements of Operating Results" (Appendix A to Carrad Aff't.). As noted above, FLM's monthly sales for November 1972 - May 1973 have ranged from $60,550.13 to $73,220.76.

November 1, 1972 the gross profit margin has simply dropped back to the earlier level of 16-17%. The issue before the Court on plaintiff's motion for a preliminary injunction is not whether FLM may have suffered a drop in earnings but whether FLM is in imminent danger of financial collapse. Defendants submit that a company which not only survived, but grew, over a three and one-half year period with the same gross profit margin it presently enjoys on a sales volume one-third to one-half of present sales has proven that it can survive and is in no imminent danger.

In short, plaintiff has offered no acceptable evidence of the spectre of failure and defendants have demonstrated that FLM's own "track record" shows that it reasonably can be expected to survive without the Court's intervention. Under these circumstances plaintiff is clearly not entitled to the injunction it seeks.

(c) The threatened injury to defendants in preliminary relief is not warranted by any showing as to the need for relief. Although plaintiff fails to identify what acts of Ford and of FMC in relation to plaintiff it would restrain or would change, plaintiff's overall approach is to attack generally the Ford method and policy for the distribution of crash parts. If what plaintiff seeks is a fundamental change in Ford's distribution of crash parts

any such relief must necessarily await a clear and specific demonstration that Ford's policy is in contravention of law and that plaintiff is entitled to such significant and profound relief.

Ford distributes crash parts through FMC to approximately 6,800 Ford dealers throughout the United States. The method and policy of distribution are established on a uniform basis nationally. (Thompson Aff't.). It would work an enormous hardship upon Ford to effect a nationwide change in its distribution system in response to a perfunctory preliminary application by plaintiff who asserts a generalized dissatisfaction with the Ford system.

A middleman in a distribution system has no vested right to the protection of his particular role in distributing a product. The United States District Court in Illinois has recently reaffirmed this fact. Green Bay Packaging, Inc. v. Hoganson & Associates, Inc., 72 C. 59 (N.D. Ill. August 7, 1973), Slip Opinion at 10. Even were plaintiff's role threatened with extinction -- of which there is in fact no evidence -- it would not warrant this extraordinary relief in advance of a determination on the merits of requiring Ford to change its current system of distribution for crash parts.

3. Plaintiff's procrastination in making the present motion completely belies its claim that relief pendente lite is necessary or appropriate. We have already noted that plaintiff has proceeded in a leisurely fashion to seek its injunctive relief.

--It waited three and one-half months before filing its complaint;

--It waited six and one-half months before filing an incomplete motion for a preliminary injunction, which was then withdrawn; and

--It waited almost ten months before filing its current set of motion papers.

Such a casual application belies any urgency or any need for the extraordinary relief plaintiff now requests.

CONCLUSION

Plaintiff's motion for a preliminary injunction should be denied in all respects.

Respectfully submitted,

SULLIVAN & CROMWELL
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Robert MacCrate,

Of Counsel.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

73 Civ. 713 (TPG)

- x

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

DOROTHY M. STRICKER, being duly sworn, deposes and says that she is over the age of twenty-one years; that she is employed by the firm of Sullivan & Cromwell, the attorneys for defendants herein; that on the 17th day of September, 1973 she served the within memorandum upon David L. Wasser, Esq., attorney for plaintiff, by depositing a true copy of the same securely enclosed in a postpaid wrapper in the Post-Office Box regularly maintained by the United States Government at 48 Wall Street, Borough of Manhattan, City and State of New York, directed to said David L. Wasser, Esq. at 250 West 57th Street, New York, N.Y. 10019, that being the address within the state designated by him for that purpose upon the preceding papers in this action.

Dorothy M. Stricker

Sworn to before me this
17th day of September, 1973

Notary Public

GEORGE A. SO...
Notary Public, State of ...
Qualified in Nassau Co...
Nassau Co. Clk's No. 10...
Certificate Filed ...
New York Co. Clk's No. ...
Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

PLM COLLISION PARTS, INC., :

Plaintiff, :

-against- : 73 Civ. 713 (TPG)

FORD MOTOR COMPANY and FORD MARKETING CORPORATION, :

Defendants. :

- x

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

SULLIVAN & CROMWELL
48 WALL STREET
NEW YORK, N.Y. 10005

Plaintiff's Memorandum in Reply to Defendants' Memorandum in Opposition to Plaintiff's Motion for a Preliminary Injunction, October 1, 1973

Warner Ex 25

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

FLM COLLISION PARTS, INC.,
Plaintiff

-against-

73 CIV. 713 (TPG)

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,
Defendants

- x

PLAINTIFF'S MEMORANDUM IN REPLY TO
DEFENDANTS' MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

10/1/73

David L. Wasser, Esq.
Counsel for Plaintiff
Office & P.O. Address
250 West 57th St.
New York, N.Y. 10019

212 Ci 6 - 3880

cc:
Robert MacCrate, Esq.
Sullivan & Cromwell, Esqs., Counsel for Defendants
48 Wall Street
New York, N.Y. 10005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

FLM COLLISION PARTS, INC.,
Plaintiff

-against-

73 CIV. 713 (TPG)

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,
Defendants

- -x

10/1/73

PLAINTIFF'S MEMORANDUM IN REPLY TO
DEFENDANTS' MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

HON. THOMAS P. GRIESA:

This memorandum and accompanying affidavits and statements are submitted in reply to defendants' memorandum and affidavits.

REASONS FOR REPLY

Defendants treat previously submitted affidavits of plaintiff's as the full evidentiary output of plaintiff in support of this motion whereas, under your honor's rules, as understood by plaintiff's counsel, the prescribed procedure will be for a conference to be held with your honor at which time it will be decided whether to receive written submission of all arguments or to conduct a hearing.

Because of the submission by defendants of a lengthy memorandum making allegations of law and fact with supporting affidavits, it is now incumbent that plaintiff submit this reply correcting many of defendants' allegations and further submit evidentiary material, while still requesting a hearing to submit additional material in support of its motion for a preliminary injunction.

1. Defendant states (P.5) that "plaintiff's motion is vague and conclusory and fails to set forth any cognizable reason for the issuance of an injunction or to identify any acts to be enjoined as both the Clayton Act and Fed. R. Civ. P. 65 (d) require."

An examination of Stephen McKee's affidavit and Exhibit A and B of this reply, letters from dealers citing defendants' refusal to allow wholesale incentive credits to plaintiff and, indeed, defendants' own memorandum (Page 3 and 4) shows clearly the discriminatory practice of defendants against plaintiff ("FLM"). Plaintiff is denied its wholesale discount from defendants because Ford, on July 1, 1971 "redefined its criteria" (page 3), without bothering to notify plaintiff and through an "oversight" (page 4) permitted the credit until November 1, 1972.

The effect of Ford's discriminatory tactics on FLM's profits and jeopardy to its existence and expansion is evidenced by Exhibits C and D of this Reply.

Exhibit C, Summary Statement of Operating Results of "FLM", from October 1, 1971 through August 31, 1973, shows

that due to premiums charged by Ford dealers to FLM for the privilege of purchasing Ford parts, and due to Ford's cut-off of the wholesale incentive credits, FLM's additional costs for the year ended September 30, 1972 were $17,282 (premium charges only, at 3%); for the three months ended December 31, 1972 the additional costs were $23,532 (premium charges at 3% for October, 1972 and 5% afterwards; and incentive credits beginning with November, 1972 were removed); for the three months ended March 31, 1973, $34,974; for the three months ended June 30, 1973, $34,669 and for the two months ended August 31, 1973, $22,146. For the eight months since January 1, 1973, a period reflecting both the premium charges and loss of incentive credits, the additional cost to FLM was $91,789, an average loss of $11,473 for each month, not including obsolescence credits allowed to dealers but not to FLM.

For the above eight months, FLM's net loss before corporate taxes was $54,452, emphasizing the imperative need for a preliminary injunction ordering Ford to desist in acts discriminatory against FLM, such as its disallowance of wholesale incentive credits, and obsolescence credits, and to desist in its rule that FLM must be billed through dealers at a premium to FLM, even though FLM places its order with Ford and picks up its deliveries from Ford.

For the two months ended August 31, 1973, net profit estimated was $3,725 before officers' salaries, pension funds, etc., not enough to maintain the organization and pay

the salaries of the two manager-officers, each having more than twenty-five years of experience managing and selling Ford parts and highly qualified to receive their present salaries and fringe benefits.

2. (a) Defendant argues (P.9) that plaintiff has not sustained the burden of proof for any of the elements of a meritorious claim for a preliminary injunction.

Plaintiff has a fair chance of success on the merits, as noted in plaintiff's original memorandum; it cannot be expected that all of the evidence of this case must be presented in an application for a hearing on a preliminary injunction, but it is obvious that defendants are in restraint of trade in depriving plaintiff of its ready access to wholesale crash parts without having to pay premium penalties to dealers, (defendants own memorandum cites the system), by conspiring with Ford-controlled dealers to cut-off plaintiff's supplies (see McKee affidavit with this Reply) and in withdrawing its wholesale incentive credits from plaintiff, even though plaintiff performs a much-needed supply and technical service that the dealers are unable to fulfill, and which service benefits the public and defendants themselves.

This discrimination is clearly within the penalty provisions of the Sherman Act, the Clayton Act and the Robinson-Patman Act, as reflected in plaintiff's original memorandum.

Defendant asserts (P. 10) that there is a serious defect in plaintiff's complaint in that it falsely [illegible]

"FLM purchases its crash parts from ... defendants". As noted in Paragraph 3 of the McKee affidavit submitted with this Reply, FLM, over the years, has ordered its supplies from defendants, has picked up supplies at defendants' facilities, has dealt directly with defendants' officers, managers and other employees.

The direct dealing between plaintiff and defendants, including the audit of plaintiff's book by defendant is further emphasized in EXHIBIT E of this memorandum, a true photo of a report of an interview held in February 1, 1973 between Stephen McKee and legal investigators of the Federal Trade Commission.

(b) Defendant argues (P.9) that there is no irreparable injury if the specific relief is not granted. Reference is made to Section 1 of this Reply, showing the intensifying effect of defendants' actions and to EXHIBIT C, the supporting statement, and to EXHIBIT D, a comparative statement of plaintiff's financial condition as of September 30th, 1972 and June 30th, 1973. As a result of defendants discrimination against plaintiff, plaintiff's net working capital (i.e., current assets less current liabilities) declined from $92,833 at September 30th, 1972 to $39,224 at June 30th, 1973; plaintiff's capital declined from $114,110 to $61,468 and plaintiff has been forced to incur outside financing (See McKee's affidavit in original memorandum and Liabilities Section of the Balance Sheet).

It is obvious that a preliminary injunction is needed, ordering Ford to not withhold from its dealers on sales to FLM wholesale incentive and other credits granted to dealers on other sales, or the plaintiff might be in too much of a financial hardship to survive the further developments of this case.

(c) Defendant argues (P.9) that plaintiff must demonstrate that the harm which defendants would suffer as a result of granting relief to plaintiff is not greater than the harm which is to be averted. We have already demonstrated the harm which is befalling plaintiff due to defendants cut-off of wholesale credits. The effect on defendants will even be greater if an injunction is not granted and if FLM ceases its operation or reduces its expansion, as FLM supplies a vital need to body shops which repair Ford cars, including Ford dealers who operate in-dealership body repair shops, and their customers and its operations have been beneficial to defendants: same-day service with technical advice; regional warehousing; good business practices and high credit standing; self-capitalization. Plaintiff's purchases are defendants' sales but, even more important, for Ford cars on the road, FLM's service is needed, helps maintain Ford's reputation, whereas Ford dealers are generally primarily interested in new car sales and are not equipped to duplicate FLM's service to body shops and to Ford dealers themselves (See Exhibit E).

(d) Defendant states (P.15) that plaintiff cannot be heard to complain that it cannot purchase Ford parts.

-6-

Obviously, the requirement that plaintiff purchase its parts from dealers and not from defendants and at a penalty charge of 5 per cent merely for billing purposes, and on a short-term basis with financing arrangements at the whim of the dealer (see McKee affidavit and attached Thomas Motors Schedule where weekly payments were required) does not assure plaintiff and its customers of a steady flow of Ford parts; as in the Thomas Motors case (McKee present affidavit), Ford owns and controls this dealer, and re-arranged its management without prior notice to FLM and then (McKee affidavit) the supplies to FLM were cut-off; the history of cut-off was the same with the Atlas Lincoln-Mercury Co. Supply (McKee affidavit).

(e) On Page 15, defendant in its argument quotes the Court of Appeals with regard to Section 2 (a) of the Robinson-Patman Act, "... the Act concerns itself with the price discrimination which is reasonably calculated to lessen competition, or tends to create a monopoly, or to injure, destroy or prevent competition."

Ford, controlling approximately 25 per cent of the entire automotive industry of this country, certainly has created a monopoly with all of its evils, in preventing the free access to its supplies by a wholesaler such as plaintiff and in depriving it of a proper volume discount such as is available to others having substantially less volume of purchases.

(f) Defendants' arguments, Pages 20-23 are answered [illegible] of this Reply, and [illegible] C & D, thereto.

that FLM is now operating at a loss due to defendants' removal of its incentive credit, etc. The footnote on page 21 should read "5%" and not "3%".

Defendant is arguing on Page 24, in substance, that plaintiff should accept its gross profit rate of its ealy years, prior to the issuance by Ford of its wholesale incentive credits, and ignore the fact that, while it was eligible to receive the credits from 1968 through 1972, and it grew, reinvested capital into Ford inventories, set up government-approved pension plans for its officers and employees, that it should now be content to forego its wholesale discount, based upon a unilateral decision of Ford to rearrange its "eligibility" list, even though it, the plaintiff, is the wholesaler and those who generally receive the discount, the dealers and body shops, are retailers. Under the Robinson-Patman Act, it is clearly intended that volume purchasers shall be treated on an equal basis, the discounts to reflect the volume of purchases.

(g) On Page 17, defendants deny that defendants have set up a vertical integration so as to create a monopoly. Setting up dealerships, such as Thomas Motors, Inc., owned and controlled in the majority by defendants, prevents purchasers such as FLM from free access to the supply market beyond the control of the manufacturer. Similarly, acts by Ford in setting up a fully-owned warehouse operation, such as Ford Marketing Corporation, and in preventing plaintiff from operating its own warehouse operation and in refusing to sell the plaintiff

unless the bills are sent to defendants' dealers with a penalty premium and without a wholesale discount are depriving the public of the free, competitive flow of Ford crash parts.

(h) On page 25, defendants assert that it would work an enormous hardship upon Ford if it had to effect a nationwide change of its distribution system. This cannot be true. The change by Ford in 1968, instituting its wholesale incentive system, caused no hardship on Ford. Its profits mounted, year by year. The change in 1971 redefining "eligible" customers, and now applied to plaintiff in 1972, could only hurt Ford. If FLM ceases or limits its operation, parts will be less available to body shops and not on the same day delivery service that FLM supplies; if FLM benefits Ford in the Yonkers - North Bronx area, it follows that similar distribution systems in other areas will similarly benefit defendants.

(i) Defendants, on Page 26, give great weight to plaintiff's alleged delay in proceeding to seek injunctive relief, and assert that, therefore, no extraordinary relief should now be sought.

The fact that the complaint was filed three and one-half months after the last date of incentive credits, is insignificant, as it was hoped that the incentive credits would be allowed without litigation; indeed, it was allowed on purchases from Atlas-Lincoln Mercury for the period July 1, 1972 through November 6, 1972, after plaintiff was informed that it was discontinued but plaintiff's attorney protested. The complaint was filed after receipt of the replies from dealers dated

January 17, 1973 and January 23, 1973 (EXHIBITS A and B), indicating that Ford would not honor plaintiff's request for the credits.

Subsequent to the filing of the complaint, an extension was given to defendant to answer the complaint, and upon the answer, discovery proceedings were instituted by defendant, wherein thousands of documents were requested and a large bulk of these documents were taken by defendants' counsel for duplicating purposes. These discovery proceedings preoccupied the plaintiff, with its small staff, in preparing for the proceedings, and, upon the return of the documents, further preoccupied plaintiff and its staff, as the documents were disarranged and some were missing. These discovery proceedings further delayed other proceedings, as plaintiff agreed to supply defendants' counsel with financial statements being worked upon but not yet completed.

Plaintiff is a small company with a small staff and, faced with the jeopardy of the removal of its incentive credits, could not hire additional staff to complete its records quickly to evaluate its losses to use in legal process or to disrupt its managerial process more than it has done in meetings with its counsel.

Defendant is in error in alleging that the original motion papers filed herein were withdrawn; they were never withdrawn. Memorandum was filed by plaintiff's counsel, after extensive investigation and research, and because of the above

discovery proceedings, sundry stipulations and the need for completion of financial records, the motion papers were not completed until now.

CONCLUSION

Relief was and is now being sought from the Federal Trade Commision in this matter, evidence having been presented to that Commission, and plaintiff's counsel has been informed that subpoenaes should be issued shortly, but the government procedure is cumbersome and might be over an extended period of time.

It has been hoped by plaintiff that Ford would settle this matter, since FLM's operation actually benefits Ford, but since Ford has not, and, as Schedules C and D indicate, immediate relief is needed by plaintiff, the injunction should be granted, specifically:

(1) Ordering defendants to desist from withholding wholesale incentive credits from plaintiff on its volume purchases of Ford crash parts;

(2) Ordering defendants to desist from discrimination against plaintiff in obsolescence return credits on these parts;

(3) Ordering defendants to desist from withholding direct sales of crash parts to plaintiff by defendants, without the necessity of forwarding bills through dealers and the necessity of plaintiff paying the dealers a premium.

(4) Ordering defendants to desist from interfering with dealers who wish to sell to plaintiffs.

Respectfully submitted,

October 1, 1973

David L. Wasser

DAVID L. WASSER,
Attorney for Plaintiff,
FLM Collision Parts, Inc.

250 W. 57th Street
New York, N.Y. 10019

Affidavit of James R. Rose, Sworn to October 15, 1973

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

- x

73 Civ. 713 (TPG)

AFFIDAVIT

STATE OF NEW JERSEY)
: ss.:
COUNTY OF BERGEN)

JAMES R. ROSE, being duly sworn, says:

1. I am the Newark District Sales Manager of the Ford Parts Division of Ford Marketing Corporation ("FMC"), having held that position since May, 1970. In this position I have been familiar with the operation of Ford Motor Company's ("Ford") and FMC's Wholesale Incentive Plan and with the operations of FMC's New York Parts Distribution Center in Teterboro, New Jersey. This affidavit is submitted in opposition to plaintiff's motion for a preliminary injunction.

2. FMC, through the Teterboro parts depot, sells Ford branded crash parts only to franchised Ford or Lincoln-Mercury dealers.

3. FMC does allow the customers of the dealers to pick up parts directly from the Teterboro parts depot if written authorization to do so is received from the dealer

10-15-73

which sells the customer parts. However, the dealer, not the dealer's customer, is billed by FMC for the parts.

4. In October, 1972 it came to my attention that Atlas Lincoln-Mercury Inc. of Brooklyn, New York, a franchised Lincoln-Mercury dealer, was claiming and receiving incentive credits under FMC's Wholesale Incentive Plan for sales to FLM, which was not an eligible customer under the plan. I immediately notified Atlas that under established company policy incentive credits were not allowed on sales to wholesalers such as FLM.

5. It also came to my attention at this time that FLM had not been authorized in writing by Atlas to pick up parts at the Teterboro depot. (FLM's authorization to pick up parts from Atlas' predecessor, Central Lincoln-Mercury, had automatically expired, as required by FMC policy, in July, 1972 when new management took over the dealership.) I informed Mr. David Pollack, the dealer principal of Atlas, that Atlas could not claim incentive credits on sales to FLM and that Atlas would have to authorize FLM in writing to pick up parts from the New York Parts Distribution Center in order for FLM to continue to do so.

6. I did not then or at any other time, suggest, tell or advise, directly or indirectly, Atlas or any other dealer to stop selling parts to FLM. Nor, to the best of

my knowledge, has any other person connected with FMC or Ford ever done so.

James R. Rose

Sworn and subscribed to
before me this 15th day
of October, 1973.

Notary Public

ARTHUR J. CHARTERS
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires April 5, 1976

Affidavit of David Pollack, Sworn to October 15, 1973

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

- x

73 Civ. 713 (TPG)

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF KINGS)

DAVID POLLACK, being duly sworn, says:

1. I am the President of Atlas Lincoln-Mercury, Inc. ("Atlas"), of Brooklyn, New York, a franchised Lincoln-Mercury dealer. (This dealership had operated under the name of Central Lincoln-Mercury until Atlas purchased it.) I have been the President of Atlas since July 14, 1972 and in that capacity have been in charge of all of Atlas' activities. I am fully familiar with the relationship between Atlas and FLM Collision Parts, Inc. ("FLM"), the plaintiff in this action, since July 14, 1972. This affidavit is submitted in opposition to plaintiff's motion for a preliminary injunction.

2. Upon assuming control of Atlas I reviewed its business practices and operations, including its sale of parts to FLM. I concluded that FLM's debt to Atlas was too large, that payments of FLM's accounts were being made

too slowly and that the margin of profit on Atlas' sales to FLM was too low to make sales of parts to FLM a sound or attractive business practice for Atlas. Atlas' sales of parts to FLM also caused severe disruptions of Atlas' business because parts intended to go to FLM in Yonkers often arrived at Atlas in Brooklyn and vice versa. I did not, however, terminate sales to FLM immediately because I felt I would have a difficult time collecting FLM's present debt to Atlas if I stopped selling parts to FLM too abruptly.

3. Near the end of October, 1972, I was informed by officials of Ford Marketing Corporation ("FMC") that FLM would not be allowed to pick up parts which Atlas had sold it directly from FMC's New York Parts Distribution Center in Teterboro, New Jersey unless I would authorize FLM to do so in writing. (I was told that FLM's written authorization from Central Lincoln-Mercury, Atlas' predecessor, had automatically expired when Atlas acquired the dealership.) I was also informed at this time that FLM was not an eligible customer under Ford's Wholesale Incentive Plan, and that Atlas could not claim incentive credits on its sales to FLM. However, I was not told at that time or at any other time by anyone connected with FMC or Ford Motor Company that I could not or should not sell parts to FLM. I was, in fact, expressly told that I could continue selling parts to FLM and that FLM could continue to pick up its parts directly from the New York Parts Distribution Center if I would authorize FLM to do so in writing.

4. I decided that this would be an opportune time for me to stop Atlas' sales of parts to FLM and I informed FLM that I would not authorize it to pick up parts from the New York Parts Distribution Center or make any further sales of parts to FLM.

5. I never told FLM that anyone connected with FMC or Ford Motor Company had told, suggested or advised me to stop selling parts to FLM.

David Pollack

Sworn and subscribed to
before me this 15th day
of October, 1973.

Notary Public

LORRAINE P. VEROLA
Notary Public, State of New York
No. 24-[illegible]
Qualified in Kings County
Commission Expires March 30, 197[illegible]

Defendants' Memorandum in Response to Plaintiff's
Reply Memorandum, October 17, 1973

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

FLM COLLISION PARTS, INC., :

Plaintiff, :

-against- : 73 Civ. 713 (TPG)

FORD MOTOR COMPANY and FORD MARKETING CORPORATION, :

Defendants. :

- - - - - - - - - - - - - - - - - - x

DEFENDANTS' MEMORANDUM IN RESPONSE TO PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION

Defendants Ford Motor Company ("Ford") and Ford Marketing Corporation ("FMC")* submit this memorandum in response to plaintiff FLM Collision Parts, Inc.'s ("FLM") reply memorandum on the issue of whether or not plaintiff should be granted a preliminary injunction. Defendants are compelled to submit this memorandum because plaintiff's reply papers and memorandum ("Pl.R.Mem.") filed on October 2, 1973 are, in reality, a new set of motion papers which attempt to cure the substantial deficiencies of plaintiff's earlier submissions. The new motion papers introduce new and revised data concerning FLM's financial condition,

* Both defendants are hereinafter sometimes collectively referred to as "Ford".

make new allegations of fact concerning the alleged relation between FLM and the defendants, raise new legal arguments and indicate, for the first time, the nature of the summary relief FLM seeks against the defendants.

However, none of the plaintiff's new arguments or allegations are sufficient to cure the inadequacy of its original motion. Defendants submit that FLM's motion should be denied because:

-- the new financial data prepared and submitted by FLM serves only to reinforce the fact that it will not suffer irreparable injury if its motion is denied;

-- new factual assertions made by FLM are both inaccurate and immaterial and afford no basis for reordering, by preliminary injunction, the nationwide system by which Ford distributes its crash parts;

-- FLM's new legal arguments provide no basis for injunctive relief; and

-- the summary relief requested in the reply memorandum is totally unwarranted by plaintiff's showing upon this motion.

The background of the present motion was set forth at pages 2 to 5 of Defendants' Memorandum in Opposition to Plaintiff's Motion for a Preliminary Injunction filed September 17, 1973 ("Def. Mem.") and is not repeated here.

Argument

1. The new financial data submitted by FLM contradicts its contention that injunctive relief pendente lite is necessary. Plaintiff's reply includes as Exhibit C a "Summary Statement of Operating Results -- 10/1/71-8/31/73". This document restates the previously stated operating results of FLM for the fiscal year ended September 30, 1972 ("fiscal 1972") and produces, for the first time, financial statements prepared by plaintiff's accountants for a period after September 30, 1972.

A central issue on this application for a preliminary injunction is whether or not FLM is in imminent danger of financial collapse. The resolution of that issue depends upon whether or not FLM's profits, after the Ford dealers supplying FLM allegedly raised the prices on the parts they sold to FLM, are sufficient to enable FLM to continue to do business. Plaintiff's own financial statements clearly show that it can and does continue to do business profitably and, indeed, in expanded volume.

FLM's new financial statements show a gross profit margin* of 15% since January 1, 1973. Defendants had estimated from FLM's records that the gross profit margin would be about

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* FLM in its financial reports defines "gross profit" as sales less cost of parts sold. FLM's "gross profit margin" is then defined as gross profit divided by sales.

16% or 17% (Def. Mem. pp. 21, 24)* as compared to a gross profit margin of 17% to 18% in the three and one-half years before the institution of the Wholesale Incentive Plan (Def. Mem. p. 21). FLM established in that earlier period that it not only could survive, but actually expand from average monthly sales of $13,611.58 in fiscal 1965 (six-month period) to average monthly sales of $32,498.96 in fiscal 1968 (Def. Mem. p. 23). Defendants submit that such a "track record" at a 17% to 18% gross profit margin clearly establishes that FLM can not only survive, but prosper, at a 15% gross profit margin now, especially since FLM's average monthly sales are now about $67,000 -- twice what they were in fiscal 1968.

Another interesting feature of FLM's new financial statements is that they completely belie the statements that the present state of affairs "does not assure plaintiff and its customers of a steady flow of Ford parts...." (Pl.R.Mem. 7). In fiscal 1972 FLM sold $736,967 worth of parts. Based on FLM's eleven-month figures to August 31, 1973, it is projected that it will have sold $806,000 worth of parts in fiscal 1973, an

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* The difference between the 15% rate plaintiff derives and the 16% to 17% estimate by defendants is attributable to the fact that Mr. McKee and plaintiff's attorney-accountant stated on June 8, 1973 that 3% should be added to certain cost figures (Carrad Aff't. ¶ 4) but now assert that 5% should be added (Pl.R.Mem. p. 8; Wasser Aff't. ¶ 3). In any event, even if one accepts plaintiff's present figures, the difference is not material.

increase of 9.3% over last year. Such an increase in sales obviously would not have been possible without a steady, and even increasing, supply of parts.* Plaintiff's financial statements display, even for the period after plaintiff was allegedly "cut off" by one of its suppliers, Thomas Motors, Inc., on June 11, 1973 (McKee Aff't. ¶ 2(a)), no decrease in sales consistent with any adverse effect on FLM's business.**

It is noteworthy that Messrs. McKee and Andidero have continued to pay themselves at the same high rate of $104,000 per year in salary, deferred profit sharing and pension plan benefits as they did in fiscal 1972. It is also noteworthy that despite the statement that FLM is operating at a loss and has suffered a decline in "net working capital" and "capital" (Pl.R.Mem. p. 5; Ex. D), FLM was able, between September 30, 1972 and June 30, 1973, to:

--Spend $8,582 on new automobiles;

--Increase its parts inventory by $6,533;

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* Nor has FLM been forced to reduce its inventory to maintain its record-breaking level of sales; its inventory of parts actually increased by $6,533 between September 30, 1972 and June 30, 1973 (Pl.R.Mem. Ex. D).

** It should be noted that Exhibits A and B to Pl.R.Mem., letters from Thomas Motors, Inc. and Parkview Lincoln-Mercury, Inc. to FLM, refer only to termination of those dealers' incentive credits and not to a "cut-off" of FLM's supply of parts.

--Allow its uncollected bills (accounts receivable) to increase by $4,256;

--Increase its "prepaid expenses" by $1,786; and

--Leave outstanding a $6,000 loan to its stockholders -- Messrs. McKee and Andidero.

Defendants submit that the shuffling and reshuffling of assets and liabilities performed on plaintiff's balance sheets cannot obscure two important conclusions which plaintiff does not and cannot dispute:

1. FLM's gross profit margin, which has stabilized at about 15% since January 1, 1973, is only slightly less than the 17% to 18% gross profit margin upon which it not only survived, but expanded its sales almost threefold, in a three and one-half year period in 1965-1968. (Moreover, at present FLM's dollar sales volume is more than twice as much as it was in 1968).

2. Far from being "cut off" from a steady supply of Ford parts, FLM's fiscal 1973 sales have jumped 9.3% over fiscal 1972.

It is absurd to allege, on the basis of these restated figures which plaintiff itself has now produced, that FLM is in imminent danger of failure. It is not, and its own proven "track record" belies the assertion.

3. New factual allegations made by FLM are both inaccurate and immaterial and afford no basis for reordering,

by preliminary injunction, the system by which Ford distributes crash parts.

A. FLM's relations with its dealer-suppliers. Mr. McKee's affidavit recites that "On June 11, 1973 I received a telephone call from Mr. Fiveson, who told me that he had cut off sales to FLM . . . 'as instructed by Ford Motor Company'." (McKee Aff't. ¶ 2(a)). This hearsay assertion of Ford's purported conduct should be contrasted with the sworn statement of Mr. Fiveson, submitted with defendants' original memorandum, that Mr. Fiveson was not instructed to take any action with respect to FLM by either defendant, but made the decision to stop selling parts to FLM on his own without any intervention from Ford (Fiveson Aff't. ¶¶ 3, 4).

Mr. McKee offers more second-hand hearsay when he states that "On October 31, 1972, I received a telephone call from Mr. David Pollack, manager of Atlas Lincoln-Mercury and he stated to me that, on advice of Mr. J. R. Rose, District Sales Manager of Ford Marketing Corporation, there will be no further delivery of parts nor allowance of wholesale incentive credits . . . ." (McKee Aff't. ¶ 2(c)). Defendants do not dispute that Mr. Rose told Mr. Pollack that Atlas Lincoln-Mercury would no longer receive Wholesale Incentive Plan payments on its sales to FLM in accordance with Ford's Wholesale Incentive Plan eligibility criteria. But Mr. McKee's allegation

that Mr. Rose or anyone else at Ford ever told Mr. Pollack to stop selling parts to FLM is untrue, as is demonstrated by the affidavits of Messrs. Pollack and Rose which accompany this memorandum.

Thus,there is clearly no basis for the charge that defendants are guilty of "conspiring with Ford-controlled dealers to cut-off plaintiff's supplies" allegedly "in restraint of trade" (Pl.R.Mem. p. 4). Mr. McKee's hearsay assertions as to Ford's conduct are directly rebutted by the sworn statements of Messrs. Fiveson, Pollack and Rose.

B. FLM's relations with Ford. Paragraph 3(a) of Mr. McKee's affidavit sets forth certain contacts which FLM claims to have had with one of the defendants and by which it presumably seeks to invoke the "indirect purchaser" doctrine. (See Def. Mem. pp. 12-13). It is not disputed that FLM drivers "made continuous pickups [of parts] at Ford's Teterboro [warehouse]" (McKee Aff't. ¶ 3(a)). But such pickups for the account of a Ford dealer are in no sense a sale by Ford to FLM, even under the most liberal application of the "indirect purchaser" doctrine. FLM and other customers of Ford dealers are allowed to take direct delivery of parts from a Ford warehouse only under the following conditions:

1. Ford receives a letter from a dealer authorizing one of its customers to pick up the parts -- not to purchase them.

2. Ford bills the dealer, not the dealer's customers, for the parts. (It is the dealer who is liable to Ford and bears the risk that it will not be paid by its customer.)

3. The dealer then bills its customer for the parts the customer has purchased from it. (Rose Aff't.)

In short, while physically the parts pass directly from the Ford warehouse to the dealer's customer, the dealer is an indispensable party to the actual sales of the parts, which are sold by Ford to the dealer and then by the dealer to its customer. Permitting the dealer's customer to pick up the parts directly from the Ford warehouse is purely a convenience which does not affect the underlying sales transactions from Ford to the dealer and then from the dealer to its customer.

Mr. McKee also refers to the fact that FLM's purchases of parts from Ford dealers have been audited by Ford's auditors. But, as defendants pointed out in their original memorandum, these audits were conducted as a check on Ford dealers' claims for wholesale incentive payments from Ford on parts sold by the dealers to FLM (Def. Mem. p. 13n). None of these contacts between Ford personnel and FLM constitute the sort of intervention by Ford into the contracts of sale between various dealers and FLM which have been held to trigger the application of the "indirect purchaser" doctrine. (See Def. Mem. pp. 12-13; Rowlands Aff't.)

In short, FLM's new factual allegations are in substantial part inaccurate and, in any event, immaterial to demonstrating any basis for a preliminary injunction.

3. Plaintiff's further legal arguments are without merit. FLM's reply memorandum appears to advance several new and vaguely stated legal arguments, but offers neither case citation nor specification of any section of law it claims to have been violated.

A. The purported "premiums for the privilege of purchasing parts". On pages 3,4 and 7 of plaintiff's reply memorandum, it asserts that 3% (or 5%) mark-up from the "list price" of the parts it purchases from Ford dealers represents a fee charged by the dealers merely for "the privilege of purchasing parts". This characterization is absurd on its face. No businessman resells goods to his customers at his cost. As noted above, the Ford dealers who sell FLM its parts necessarily assume the credit risk; if FLM does not pay the dealers for the parts it buys, the dealer is still indebted to Ford for the parts it has purchased for resale to FLM. FLM's argument ignores this assumption of risk, common to most businesses, and for which 3% or even 5% is a relatively small charge.* Moreover, Ford's dealers, as

---

* FLM itself has a "Reserve for Bad Debts" of about 15% of its Accounts Receivable. (PL.R.Mem. Exhibit D).

do other sellers, necessarily incur the expense of record keeping of parts sold, billing and other bookkeeping, and other normal administrative expenses. To these expenses, of course, must be added some margin of profit.

B. "Volume" discounts. FLM makes several references to the "fact" that it purchases greater quantities of Ford parts than some other unspecified purchasers. (Pl.R.Mem. pp. 7, 8). Ford allegedly deprives FLM "of a proper volume discount such as is available to others having substantially less volume of purchases." (Pl.R.Mem. p. 7). No specification is offered; in fact, FLM does not even identify any of the other purchasers of Ford parts with whom it compares itself. Moreover, the availability of wholesale incentive credits to dealers are in no way related to the quantity of parts purchased. The only criteria governing whether incentive payments will or will not be made to Ford dealers is whether the parts are resold and the nature of the customers to whom the dealers sell the parts; automotive service and repair shops are eligible customers and middlemen such as FLM are ineligible. (Def. Mem. pp. 2-3; Rowlands Aff't. ¶ 5.)

Furthermore, while Section 2(a) of the Robinson-Patman Act provides that sellers may, under certain circumstances, grant discounts to buyers of larger quantities of their goods, it does not require them to do so. In fact,

a seller who grants a quantity discount to certain purchasers bears the burden of proof in establishing that the discount is within the scope of the "cost justification" defense of Section 2(a). Nagler v. Admiral Corp., 248 F.2d 319, 326 (2d Cir. 1957) citing FTC v. Morton Salt Co., 334 U.S. 37, 45 (1948).

C. "Warehouse operations". On pages 8 and 9 of its reply memorandum, FLM charges that "acts by Ford in setting up a fully-owned warehouse operation, such as Ford Marketing Corporation, and in preventing plaintiff from operating its own warehouse operation . . . are depriving the public of the free, competitive flow of Ford crash parts." Just how Ford has allegedly prevented FLM from operating its own "warehouse" is neither specified nor self-evident. Does plaintiff seriously suggest that Ford must distribute its parts on a nationwide basis without itself operating some sort of regional warehousing system? If so, not only plaintiff but all purchasers of Ford parts, including franchised Ford and Lincoln-Mercury dealers, would truly be deprived of "a steady flow of Ford parts". This new charge is incomprehensible and in no way supports the extraordinary relief for which plaintiff asks.

4. The summary relief requested in FLM's reply memorandum is totally unwarranted by plaintiff's showing

upon this motion. The total inadequacy of plaintiff's showing to support the summary relief it requests is apparent when the items of such relief, now enumerated for the first time in FLM's reply memorandum (pp. 11-12), are examined. FLM seeks a mandatory injunction which would effectively reorder the entire nationwide distribution system of Ford for its crash parts. FLM apparently now asks the Court

-- to order FMC to give a discount to its dealers if they resell parts to wholesalers in the position of FLM;

-- to order FMC to direct Ford dealers to give credit to wholesalers who want to return obsolete parts; and

-- to order Ford and FMC to sell parts directly to wholesalers and to abandon the existing system of distribution through Ford dealers.

Such a radical change in the established method of distributing crash parts would have a profound effect not only upon Ford and FMC but also upon the nation's approximately 6,800 Ford and Lincoln-Mercury dealers. Even a minor change in Ford's nationwide plan entails extraordinary expenditures of time, energy and manpower in formulating the change, informing all affected persons of the change and supervising the implementation of the change. In any event, FLM has made no showing whatsoever, as the law requires, that

the "balance of hardships" tips in its favor. Nothing that plaintiff has shown either as to its own business condition, as to the operations of the present system or as to its legal position would warrant the granting of such relief in advance of a full explanation of the issues upon trial.

CONCLUSION

As we have noted, plaintiff in its reply memorandum indicates for the first time the nature of the mandate which it seeks from the Court by way of preliminary relief (Pl.R.Mem. pp. 11-12). It would compel Ford to reorder in substantial respects its current nationwide method for distributing its crash parts. Neither the factual showing by plaintiff nor its legal contentions warrant any such extraordinary preliminary relief. The motion of FLM should be denied in all respects.

Respectfully submitted,

SULLIVAN & CROMWELL
Attorneys for Defendants
Ford Motor Company and
Ford Marketing Corporation,
48 Wall Street,
New York, New York 10005

Robert MacCrate,
Of Counsel.

October 19, 1973

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

FLM COLLISION PARTS, INC.,

Plaintiff,

- against -

73 Civ. 713 (TPG)

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

- x

DEFENDANTS' MEMORANDUM IN RESPONSE TO PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION

SULLIVAN & CROMWELL
48 WALL STREET
NEW YORK N Y 10005

Plaintiff's Memorandum in Reply to Defendants'
Second Memorandum Opposing Plaintiff's
Motion for Preliminary Injunction,
October 26, 1973

ENTERED
Wasser Ex 26

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - -x

FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

73 Civ. 713 (TPG)

- - - - - - - - - - - - - - - - - - -x

10/26/73

PLAINTIFF'S MEMORANDUM IN REPLY TO DEFENDANT'S SECOND MEMORANDUM OPPOSING PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

DAVID L. WASSER
250 West 57th Street
New York, N.Y. 10019

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- -x

FLM COLLISION PARTS, INC. :

Plaintiff, : 73 Civ. 713 (TPG)

-against- :

FORD MOTOR COMPANY and FORD MARKETING CORPORATION, :

Defendants. :

- -x

PLAINTIFF'S MEMORANDUM IN REPLY TO DEFENDANT'S SECOND MEMORANDUM OPPOSING PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Plaintiff, FLM COLLISION PARTS, INC., submits this memorandum in reply to the second memorandum filed by defendants in opposition to plaintiff's motion for a preliminary injunction.

Defendants treat plaintiffs' original reply memorandum as a new set of motion papers, defendants introduce new and substantially erroneous arguments in their new memorandum and, therefore, plaintiff is now compelled to file this reply to defendants' new memorandum.

Argument

Defendants, in their erroneous argument that their cut-off of wholesale credits to plaintiff, allowed in prior [illegible], has caused no injustice to plaintiff, that the cut-off is merely reinstating plaintiff's status to that existing before the

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wholesale credit plan was devised in 1968, and that the cut-off is, therefore, not threatening the existence and continuation of plaintiff's business. have gone through the gyrations of accounting figures containing gross and substantial errors of accounting theory:

1. Use of "Profit Margin" figures by Defendants to show "no harm" to Plaintiffs-In section 1 beginning on page 3 of their new memorandum, defendants repeatedly refer to the "gross profit" margin (gross profit divided by sales) of plaintiff's operation, which defendants state is now 15% as compared to a gross profit margin of 17% to 18% in the three and one-half years before the institution of the wholesale incentive plan; defendants then state: "Defendants submit that such a "track record" at a 17% to 18% clearly establishes that FLM can not only survive, but prosper, at a 15% gross profit margin now, especially since FLM's average monthly sales are now about $67,000 --- twice what they were in fiscal 1968."

Defendants, in the above argument, avoid reference to the Net Profit margin of plaintiff (net profit divided by Sales), and assert a belief that plaintiff, as a company, can prosper now on a gross profit margin lower than that which existed five years ago, ignoring all of the plaintiff's present expenses needed to maintain its business.

Examination of plaintiff's Exhibit "C" in plaintiff's prior Reply Memorandum, shows that in the fiscal year ended

September 30, 1972, before defendants' monopolistic cut-off of plaintiff's incentive credit at the same time that plaintiff found no source of supply of Ford "Crash" parts except at an increased premium price, plaintiff's gross profit margin was $246,620 on $736,967 Sales, or 33.5%, and its net profit margin before officers' salaries and pension plans and corporate income taxes was $156,388 on $736,967 Sales, or 21.2% and its net profit margin after officer's salaries and pension plans but before corporate income taxes was 7.1%.

Examination of the same exhibit shows that in the eight months ended August 31, 1973, during the first full period when the plaintiff was deprived of its wholesale credits and it had to pay a 5% premium to Ford dealers to purchase its Ford parts, plaintiff's gross profit margin was $80,661 on $539,606 Sales, or 14.9%, its net profit margin before officers' salaries and pension plans and corporate income taxes was $14,881 on $539,606 Sales or only 2.8%! An even more dramatic example of the impact of defendant's cut-off of plaintiff's wholesale credits and operating privileges is that in the eight months ended August 31, 1973, plaintiff had a net loss after officers' salaries and pension plans of $54,452, or 10.1% of its Sales!

Do defendants propose that the plaintiff can prosper with such losses, and do defendants propose that plaintiff's officers, each with approximately a quarter of a century of experience in the automotive field, reduce their salaries to $600 per month (so that the plaintiff can just break even) and

abandon the pension and deferred-profit sharing plans, instituted and approved by the government on a basis that would benefit all full-time employees who are employed beyond three years?

"Moody's Handbook of Common Stocks", (Third Quarterly 1973 Edition) shows that Ford Motor Company, one of the defendants herein, had an operating profit margin of 8.0% in the year 1972, and on a vastly greater volume than plaintiff.

2. Impairment of supply source reflected by financial statements-

Defendants state, in their memorandum, beginning in the second paragraph on page 4, that "FLM's new financial statements... completely belie the statements that the present state of affairs does not assure plaintiff and its customers of a steady flow of Ford parts ..." Defendants go on to cite the projected increase of plaintiff's sales for fiscal 1973 by an estimated 9.3% over the prior year. This includes Ford parts price increase and is a reduction from the 12.6% increase between the fiscal years 1972 and 1971. Plaintiff was only able to obtain a precarious supply arrangement after 11/1/72 for its continued operation by the payment of a "premium" of 5% of purchases to Ford dealers (as compared with a prior years' premium of 3%, with no assurance of a continuation of supply under this arrangement (example: Thomas Motors cut-off of supplies after six months - McKee Aff't #2 (a)).

3. Balance sheet items in Defendants' argument have no significance.

On Page 5 and later pages of their memorandum, defendants note that plaintiffs claim a loss but continue to pay officers' salaries, and infer that (1) plaintiff's capital declines are doubtful in that new automobiles were purchased, (2) the parts inventory has increased, (3) uncollected accounts receivable have increased, (4) prepaid expenses have increased and (5) a loan to stockholders has remained outstanding.

Defendants further "submit that the shuffling and reshuffling of assets and liabilites performed on plaintiff's balance sheet cannot obscure two important conclusions ..."

Defendants have played on words, with an inference that the figures have been "shuffled and re-shuffled" and are therefore unreliable, whereas the record and standing of the Certified Public Accountants who have prepared the reports is outstanding and, while the reports are submitted to further plaintiff's cause, there has been no "shuffling" technique used.

Defendants select balance sheet figures at random and out of context of the full balance sheet and thus distort their allegations.

At this time, in this reply, plaintiff will not repeat the presentation of current profit figures shown on a comparative basis with prior periods before officers' salaries and pensions, nor repeat the experience and value of the officers in planning and instituting the growth of plaintiff, but will reply here to the above allegations:

(1) Automobile Purchases:

Plaintiff has purchased automobiles consistently since the inception of the company, said autos being used in the purchase, sale and delivery of parts and in other business transactions performed by the two officers, who carry the management of plaintiff; the last audit of the income tax return of one of the officers related to travel and entertainment expense,, resulted in a "no-change" audit. (See Wasser affidavit with this memorandum).

(2) Parts Inventory Increase.

Defendants allege that the increase of inventory parts by $6,533 between September 30, 1972 and June 30, 1973 further disproves plaintiff's argument that its net working capital has suffered in the period when defendants cut-off their credits to plaintiff.

An examination of Schedule "D" - Balance Sheet - in plaintiff's original reply memorandum, will show that while the inventory of partsdid, indeed increase by $6,533, plaintiff's Accounts Payable (bills for merchandise owed) increased by $44,677, a fact that defendants, in their latest memorandum, conveniently overlook.

Defendants also overlook the fact that the inventory supply of parts actually decreased, if we assume that the 6/30/73 inventory of $89,180 would have been $75,576, a decrease of $7,071 from the 9/30/72 inventory of $82,647, if the approximately additional 18% cost needed to pay for the purchase of parts was taken into consideration.

It may be further noted that the increased cost value

of the inventory by $6,533 was included in the net working capital figure at 6/30/73 (Total Current Assets Minus Total Current Liabilities), which declined from $92,833 on 9/30/72 to $39,224 on 6/30/73.

(3) Increase of Uncollected Accounts Receivable.

Defendants allege that the increase of plaintiff's Account Receivable balance by $4,256 casts some doubt on plaintiff's claim of "net working capital" decline:

As has been noted in the preceding section (2) hereof relating to inventory parts, the higher accounts receivable figure is included in the net working capital figure of 6/30/73.

(4) Increase of Prepaid Expenses.

This account has increased because the loans required to operate the business have had to be increased due to defendants' cut-off of credits, and, as is normal accounting practice, interest is deferred and treated as an asset and is amortized over the life of its related loan; similarly, insurance costs have increased, and insurance "unexpired" is deferred and treated as a prepaid expense.

(5) Loans to Stockholders Outstanding.

As will be noted in Exhibit "D" - Balance Sheet - Loans to Stockholders (John Andidero and Stephen McKee) of $6,000 have remained outstanding, but accruals due to these same individuals have remained unchanged at $15,140.

4. Defendants' Memorandum Is Inaccurate With Regard to FLM's relations with its Dealer-Suppliers and with Wood.

(1) Defendants claim in 3(A) that Ford had no hand in the cut-off of dealer supplies to FLM and that the facts alleged in the McKee aff't., # 2(C), relating to Ford's control of Pollack in its dealings with FLM, was hearsay and untrue; however, at the request of Mr. McKee, on October 31, 1972, FLM's counsel, David L. Wasser, called Pollack to see whether supplies could be resumed, and was given substantially the same statement rendered to Mr. McKee by Mr. Pollack earlier that day (See new Wasser Aff't.).

It should be further noted that in plaintiff's Exhibit "E" - Federal Trade Commission Interview Report - in the second paragraph on page 3, Mr. McKee stated that Thomas (Motors) had approachedFLM a week before the cut-off (at that time unknown to FLM), attempting to solicit FLM's entire purchases of Ford parts. Thomas Motors, a dealer of which Ford is a majority stockholder, knew of the cut-off before it happened, and then made a deal after the cut-off to supply FLM with its parts at an 18% increase of cost (16% benefit to Ford and 2% benefit to Thomas, plus the 3% originally paid to the prior supplier), and defendants would have us believe that Ford, with its vast power and tight control over all of its market, had no influence over the dealers in all of these proceedings!

(2) Defendants claim in 3 (B) that pickups by FLM from Ford's warehouse were not purchases from Ford for FLM's operation, but just a "convenience" for the dealer, "an indi-[illegible] to [illegible] of the parts".

Defendants, in the above argument, nowhere refer to the essential elements of the actual happenings; as noted in the McKee affidavit, #3, FLM dealt directly with defendants and ordered its parts directly from defendants, the pick-up being only part of the transaction. (Also see the first sentence on Page 3, Exhibit "E" - FTC Report).

It is obvious that Ford's billing procedure (through the dealers) is just an economic waste, a subterfuge for the continutation of Ford's monopolistic practices, the dealer not being an "indispensable party", but just a"dispensable obstacle" in the flow of interstate commerce.

Even the credit risks of the dealers throughout the history of FLM's existence.were minimal as FLM, as requested pledged assets (savings a/cs) with dealer-suppliers until these pledges were no longer requested by the dealers (See Wasser Aff't).

5. Defendant's Interpretation of the 5% "Premium" is Inaccurate.

Defendants, on page 10 of their new memorandum, assert that the 5% charge by dealers to FLM is a gross profit on sales.

As noted in Paragraph 4 hereof and elsewhere, the dealers serve no function except the receipt and relay of bills to FLM, and have suffered no credit losses. FLM orders the parts from Ford direct, using its own premises, staff and telephone expense, picks up the merchandise from Ford direct with FLM's trucks and autos, delivers the merchandise to its own warehouse, and keeps records of all the transactions.

[illegible] are indeed really net profit, the bills having been posted by

the regular bookkeeping staff of the dealers, and in a sense, are interest charges forced upon FLM by Ford, with the approximate following effect:

5% of Purchases (Eight Months Ended 8/31/73, Plaintiff's Exh. "C", Original Reply Memorandum)		$21,855
Average Accounts Payable: (Exh. "D")		
9/30/72	529,409	
6/30/73	74,086	
	$\frac{103,495}{2}$ =	$51,748
Annualized Charges $21,855 x $\frac{12}{8}$ =		32,783
Annual Rate of Return to Dealer, based upon A/cs Payable, as an obligation of dealer.		$\frac{32,783}{51,748}$ = 63.4%

Defendants overlook this fantastic return by the Ford dealers with virtually no investment and no credit losses (bad debts of FLM have no relationship with the dealers), (also - see McKee Aff't., page 2, showing payment to Thomas Motors of the bills during the month of purchases with a smaller part of the account owed being settled during the early part of the month following the purchases).

Defendants equate, in their foot note on page 10 of their memorandum, FLM's "Reserve for Bad Debts" of 15% of its Accounts Receivable, with the 5% charged by the dealers. The obvious error of accounting theory here is that defendants have equated a factor related to "real" accounts (Accounts Receivable and the Reserve) with "nominal" accounts, (5% cost charges and Purchases). Examination of Plaintiff's Exhibit "D" -

(Balance Sheet) will show that plaintiff increased its Reserve for Bad Debts by $330 in the nine months ended 6/30/73, this being an expense of .0005 of sales of $608,476 for the nine months (Exh. "C").

6. Defendant's Justification of Discrimination Against FLM in the Granting of Volume Discounts is in error.

On Section "B" on page 11 and 12, defendants are in error in arguing that FLM under the law, need not be treated equally with others on its volume purchases.

It should be noted that in the Federal Trade Commission investigative report, (Exhibit "E"), Mr. McKee (page 7, paragraph 2) indicated that of his own knowledge, there are only a few dealers in the New York area who stock crash parts on a fairly large basis.

7. Defendants Interpretation of the need for FLM's Warehouse Operations is Incorrect-

In Section "C", page 12 of defendants' memorandum, they imply that plaintiff desires a discontinuance of Ford's own warehouse operation; it is not the practice of setting up a warehouse operation, but the practice of creating a monopolistic power preventing such operations as FLM, that serves and benefits the manufacturer and the public, continuing its wholesale existence, that is the evil.

8. Defendants Assertions that Injunctive Relief for Plaintiff would harm Defendants, is Unwarranted-

Defendants argue, on pages 12, 13 and 14, that, if plaintiff's request for injunctive relief is granted, there would be a "radical change in the [illegible] method of dis-

buting crash parts ... would have a profound effect not only upon Ford and FLM but also upon the nation's approximately 6,800 Ford and Lincoln-Mercury dealers ...".

They argue, further, that FLM has not shown that the "balance of hardship" tips in its favor.

Nowhere do defendants submit any proof or make any logical sense in their argument that reinstating FLM's incentive and other credits is a"radical change". FLM received the credits previous to Ford's unilateral cut-off of the credits to companies such as FLM; the "radical change" was instituted by defendants in cutting out plaintiff from its credits, not in a reinstitution of same.

Plaintiffs' operation, as previously noted in all of plaintiffs' papers previously submitted in this case, is of both benefit to manufacturer, the dealers and the public; plaintiff is the only sufferer from the cut-out of credits and the jeopardy to its continuation (as shown by plaintiff's Exhibits C and D), of FLM's operations. Due to FLM's operation, the defendants and Ford dealers benefit because FLM has developed a fast local distribution system with a technical service combined (See McKee Affidavit, Page 4), which enables "Ford" cars to be repaired promptly, and stimulates sales of Ford parts and Ford cars.

The public benefit of FLM's operation is tremendous, due to its same-day service of crash parts including sales to Ford dealers (McKee aff't.).

Ford's net income of $870,000,000 (Moody's Handbook of Common Stock- Third Quarterly 1973 Edition) has not suffered due to the granting of incentive credits to FLM until Nov. 1, 1972, the afore-said figure being the highest annual net income figure in its history.

Conclusion

As shown, the motion for a Preliminary Injunction must be granted to avoid hardship to plaintiff and to the public and, strangely enough, to defendants.

Dated: New York, New York
October 26, 1973

Respectfully submitted,

David L. Wasser

David L. Wasser
Attorney for Plaintiff
FLM Collision Parts, Inc.

250 West 57th Street
New York, N.Y. 10019

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

73 Civ. 713 (TPG)

AFFIDAVIT

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

DAVID L. WASSER, being duly sworn, says:

I have been attorney and certified public accountant of plaintiff herein. This affidavit is submitted in support of plaintiff's memorandum in reply to defendant's second memorandum opposing plaintiff's motion for a preliminary injunction.

1. With regard to Par. 3(1) of Plaintiff's Memorandum: (Automobile Purchases)-

There have been a number of audits of the FLM's officers' income tax returns pertaining to the use of autos for business purposes and this use was substantiated, the audits resulting in either minor disallowances or "no-change" reports.

2. With regard to Par. 4(1) of Plaintiff's Memorandum: (Ford's directions to Pollack)-

On October 31, 1972, I called Mr. David Pollack, of Atlas Lincoln-Mercury, at the request of plaintiff, to inquire as to the status of FLM's supply arrangement with "Atlas"; Mr. Pollack informed me that he was discontinuing doing business with FLM on the advice of "Ford".

3. With regard to Paragraph 4(2) of Plaintiff's Memorandum: (FLM's credit status with Ford dealers)-

Since FLM commenced operations in 1965, FLM has paid all of its bills owing to Ford dealers promptly, and has a good credit standing with its bank, County Trust Company.

In the earlier years of FLM's operation, the Ford dealer billing FLM held savings account bank books of FLM's officers as collateral for the payment of bills, and I was a co-trustee of these books, along with counsel for the Ford dealer. In recent years, Ford dealers billing FLM have not required collateral, due to FLM's credit record.

David L. Wasser

Sworn and subscribed to
before me this 6th day
of October, 1973.

LEWIS B. STACKELL
Notary Public, State of New York
No. 03-9145000
Qualified in Queens County
Term Expires March 30, 1974

COPY RECEIVED
OCT 26 1973
SULLIVAN & CROMWELL
ATTORNEYS FOR

Plaintiff's Additional Memorandum and Updated
Financial Statements in Support of its Motion
for Preliminary Injunction, February 25, 1974

[illegible] DISTRICT COURT
[illegible] DISTRICT OF NEW YORK
- x

FLM COLLISION PARTS, INC.
Plaintiff

-against-

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,
Defendants

- x

73 CIV. 714 (CBM)

ADDITIONAL MEMORANDUM AND UPDATED REPORT AND STATEMENTS OF [illegible]

IN SUPPORT OF [illegible] MOTION FOR A PRELIMINARY INJUNCTION.

TO: HON. THOMAS P. GRIESA:

2/25/74

SIR:

Submitted herewith are an additional memorandum and the annual report of the plaintiff, FLM COLLISION PARTS, INC., for its fiscal year ended September 30, 1973, with comparisons with the report of the fiscal year ended September 30, 1972 and quarterly analyses for the fiscal year ended September 30, 1974.

The statements were prepared by me from the books and records of the corporation, as the Certified Public Accountant of the corporation; in this project, I was assisted by Mr. [illegible] Brand, an expert in corporate fiscal analysis.

This memorandum and accompanying statements are submitted in support of plaintiff's motion for a preliminary injunction, and show tremendous losses of plaintiff and the immediate financial jeopardy in which plaintiff has been placed due to the removal by the "Ford" organization of wholesale incentive credits previously allowed to plaintiff, the premiums [illegible] to be paid by plaintiff to "Ford" dealers for the privilege of purchasing "Ford" crash parts, plus obsolescent and other supplementary costs due to this situation.

[illegible]

Footnotes on Ford Penalties

EXHIBIT "C" -Summary Statement of Operating Results, 10/1/71 - 8/31/73 and Quarter Ended 9/30/73 (Also shown a second time to exclude major extraordinary items).

As you will note from EXHIBITS "B" and "C", despite an increase of sales of $61,980 above the prior year, from $736,967 to $798,947, the net profit after officers' accruals, before corporate income taxes, decreased from a net profit of $52,388, or 7.1 per cent of sales, to a net loss of ($85,707), or 10.7 per cent of sales. If normal accruals of officers' salaries and pension plans were maintained, and special obsolescence write-offs of inventory and special partial legal expense due to the litigation resulting from the company's suit against Ford Motor Company were excluded, the net loss after officers' accounts before corporate income taxes, would be ($79,329), or 9.9 per cent of sales for the fiscal year ended 9/30/73.

The monthly loss rate of the last nine months of the year was higher than the full year, as the year included October, 1972 when $9,222 of incentive credits were allowed and purchase premiums were at a 3% rate instead of 5%, for a difference of $1,162. Thus, the annual rate of loss is now approximately $79,329 plus $10,384, for a total of $89,713, if normal accruals are used and most extraordinary [illegible].

The chief causes of the loss for FY 9/30/73 were the [illegible] renewal fees, "lag" purchases of incentive credits ($[illegible]) [illegible] the "down" [illegible]

[illegible]

[illegible] Ford [illegible]

[illegible]

[illegible]

equipment that should be replaced but cannot [illegible]

case, added to the losses.

Beginning November 1, 1973, the management has reduced its officers' salaries from $800 per week each (two officers) to $600 each. Contributions to the Deferred-Profit Sharing and Pension Plans were suspended during the fiscal year ended 9/30/73 due to lack of funds.

The reports are restated from the corporate books to show $21,897 wholesale incentive credits settled in the fiscal year ended 9/30/72, and showmas part of the earlier year's profit.

Application has been made for $20,668 in corporate income tax referrals, due to carryback of current losses; the disposition of this is still pending.

The corporation wrote off $14,875 of its inventory as being obsolete during the current year.

The total capital of the corporation (EXHIBIT "A") declined from $114,110 at 9/30/72 to $27,853 at 9/30/73.

The Capital of the corporation has declined further and since September 30, 1973 has approached "zero", and the continuation of the existence of plaintiff is doubtful if a preliminary injunction is not granted immediately, ordering defendants to desist from negating incentive credits as previously allowed to November 1, 1972 on purchases of"Ford" crash parts by plaintiff, and ordering defendants to desist from refusing to supply "Ford" parts directly from its warehouses to plaintiff.

Respectfully submitted,

Dated, New York, N.Y.
February 25, ~~1973~~ 1974.

Counsel for Plaintiff

Office & P.O. Address

cc:
Robert Kaplan, Esq.
Shearman & Sterling, Counsel for Defendants
48 Wall St, New York, NY 10005

CASH ON HAND		$ 17456		$ 10010
ACCOUNTS RECEIVABLE	$ 6742		$ 6765	
RESERVE FOR DOUBTFUL	1007	5735	1405	5375
INVENTORIES		82647		73321
TOTAL CURRENT ASSETS		130024		134113
FIXED ASSETS:				
FIXTURES & EQUIPMENT	9141		9141	
RESERVE FOR DEPRECIATION	4607	4444	5611	3530
LAND	7450		15000	
BUILDING	4557	7811	6437	9645
TRUCKS	13653		13653	
RESERVE FOR DEPRECIATION	6984	4607	10480	3173
SECURITY DEPOSITS		7801		2271
PREPAID EXPENSES		365		2376
LOANS TO STOCKHOLDERS (AND OFFICERS)		6000		6000
GOODWILL		167		167
TOTAL FIXED & OTHER ASSETS		15777		27162
TOTAL ASSETS		191801		161275
LIABILITIES				
CURRENT LIABILITIES:				
ACCOUNTS PAYABLE		5440		73879
NOTES PAYABLE BANK (SECURED)		—		7611
ACCRUED EXPENSES:				
DUE TO OFFICERS		9140		14000
" " PENSION TRUST		4650		—
" " DEFERRED COMPENSATION		3440		—
OTHER ACCRUED EXPENSES		2432		12000
RESERVE FOR CONTINGENCIES		1574		8217
TOTAL CURRENT & ACCRUED LIABILITIES		27036		115707
MORTGAGE PAYABLE				
NOTES PAYABLE				
TOTAL LIABILITIES		27036		115707
CAPITAL:				
CAPITAL STOCK AUTH. 5000 SHS.	5000		5000	
PAID IN SURPLUS	1000		1000	

STATEMENT OF INCOME AND EARNED SURPLUS

	TWELVE MONTHS ENDED			
		% of Net Sales		% of Net Sales
SALES	$ 7369	%	$ 7[illegible]	%
LESS: Mfg. Cost Sold	$ 5122[illegible]		$ 6[illegible]	
ADD: Settlement Fund Deferred Provisions Reduc.				
Tax Transaction Gain	(2197)		2197	
Parts Cost Sold	[illegible]		[illegible]	
GROSS PROFIT →	2486	33.5	[illegible]	[illegible]
LESS: EXPENSES OTHER THAN Officers' Salaries, Deferred Profit-Sharing, Provision for Income Taxes	[illegible]		[illegible]	
NET PROFIT OR (LOSS) FROM OPERATIONS BEFORE TAXES →	1[illegible]	21.2	(54)	(.1)
Officers' Salaries	83[illegible]		828[illegible]	
Deferred Profit Sharing (Pension) Plans	[illegible]	[illegible]	2300	[illegible]
NET PROFIT OR (LOSS) AFTER Officers' Sals., BEFORE Corp. Income Taxes →	[illegible]	7.1	[illegible]	[illegible]
Realized Changes by Reorganization & Dealers Included in Above Parts Cost Sold (Not Including Loss Due To Discontinuance of Parts)				
Credit Paid to Def. Profit Sharing (Pension) Plans: Approx. 3% of Parts Sales ($76,05[illegible])	17[illegible]	.3	(3% × $[illegible])	17[illegible]
Approx. 5% of Parts Sales [illegible]			(5% × [illegible])	[illegible]
Reversal of Income Tax Credits by Corporation From "Flat": Approx. 1.[illegible]% of Parts Sales (Eliminated After 11/[illegible])	—		(1.[illegible]% × $8[illegible])	[illegible]

FLM COLLISION PARTS, INC. - SUMMARY STATEMENT OF OPERATING RESULTS
10/1/71 - 8/31/73 - WITH FOOTNOTES ON FORD PENALTY PAYMENTS
AND QUARTER ENDED 11/30/73 (ALSO, AS STATED TO INCLUDE MAJOR EXTRAORDINARY ITEMS)

EXHIBIT

	Twelve Months Ended Sept. 30, 1972		% Of Net Sales	Three Months Ended Dec. 31, 1972	% Of Net Sales
Sales		736,967		199,002	
Less: Parts Cost Sold	512,244			137,676	
Adj: Settlement Ford Dealer following period, for transactions this period	(21,897) Cr.			21,897	
Parts Cost Sold		490,347		159,573	
GROSS PROFIT		246,620	33.5	39,429	19.8
Less: Expenses Other than Officers Salaries, Deferred Profit Sharing & Pension Plans & Corp. Inc. Taxes		90,232		24,795	
Net Profit Before Officers A/cs & Taxes		156,388		14,632	
Officers' Salaries	83,200			20,800	
" Deferred-Profit Sharing & Pension Plans	20,800	104,000		5,200	26,000
NET PROFIT or (LOSS) AFTER OFFICERS' A/Cs, BEFORE CORP. INCOME TAXES		52,388			(11,368)
Penalty Charges by Ford Organization & Dealers Included in Above Parts COST SOLD: (Not Including Chargeback Credit Discrimination) Loss due to				(Not Including Chargeback Credit Discrimination)	
DURING AND TO DATE: Approx. 3% of Purchases 3% x 576,059		17,282	2.3	5,962	
Approx. 5% of Purchases (After 11/1/72)				103,794	5.2
[illegible]					
Approx. [illegible] (Removed After 11/1/72)					
[illegible] Dealers having generally substantially less Purchases		17,282	2.3		

	% Of Net Sale	Three Months Ended March 31, 1973	% Of Net Sales	Three Months Ended June 30, 1973	% Of Net Sales	Two Months Ended Aug. 31, '73	% Of Net Sales
1		205,494		203,881		130,13[illegible]	
		174,873		173,345			
3		174,873		173,345		110,7[illegible]	
3	19.8	30,621	14.9	30,636	15.0	19,40[illegible]	
5		26,590		23,514		15,6[illegible]	Est'd 2/3 Qu.
		4,031		7,122		3,72[illegible]	
		20,800		20,800			
		5,200		5,300		17,33[illegible]	
)		(21,969)		(18,808)		(13,60[illegible]	
	.9						
	2.6	166,546	8,327	4.1	165,090	8,25[illegible]	4.1	5,77[illegible] (On 10[illegible]
		166,546	[illegible]	13.6	[illegible]	[illegible]	12.0	
				17.1			17.[illegible]	

				120471		
	171,262			154,377		
14.9	13504	7.1		23377	14.9	
	GROSS PROFIT MEASURED ON THE BASIS OF THE LOANS MADE DURING THE QUARTER 23.27 14.9					
rior	37836	FINANCE CHARGES ON THE LEGAL LIMIT OF 10% AND INCREASED INTEREST ON SALE LOANS DUE TO CASE		29493		
	(26334) LOSS			(1114) LOSS		
	20,430			20800		
	(13,200)	(CREDIT CONTINUED FROM PREVIOUS PAGE)				
	(33434) LOSS			(21114) LOSS		
.0	154,377	7717	4.1		7715	4.1

Transcript of Hearing on Preliminary Injunction,
March 18, 1974

dhd

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

FLM COLLISION PARTS, INC.,

Plaintiff,

-against- 73 Civ. 713 (TPG)

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,

Defendants.

----------X

New York, N.Y.
March 18, 1974
4:45 p.m.

Before:

Hon. Thomas P. Griesa,

District Judge.

APPEARANCES:

DAVID L. WASSER, Esq.
Attorney for Plaintiff

SULLIVAN & CROMWELL, Esqs.
Attorneys for Defendnats
By: ROBERT MacCRATE, Esq. and
DAVID C. CARRAD, Esq., of Counsel

THE COURT: We have had a discussion off the record and, as I understand it, the plaintiff wishes to withdraw its motion for preliminary injunction; is that right?

MR. WASSER: Yes, your Honor.

THE COURT: And we have been discussing the question of trial date. We had, at the time of our last hearing, fixed a trial date of April 1st.

Mr. Wasser, on behalf of the plaintiff, has stated that that date cannot be met and that is understandable.

After some discussion off the record, I am going to tentatively set June 17th as a trial date. That is with the understanding that Mr. MacCrate may have to give priority to a trial before the chief judge, but at least as of now that is tentatively set.

It may be that Mr. Wasser will bring in co-counsel and he is going to work on that.

I think that we ought to work back from June 17th and set some kind of a briefing schedule. Let's work backwards and say that not later than June 10th I am to have the defendants' trial brief, not later than June 3rd I am to have the plaintiff's trial brief. That last week before the trial if anybody wants to reply they can do it but at least

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we will have the main trial briefs in by June 10th.

Now, leading up to the trial briefs, I would like to have the plaintiff start out an we'll fix a date for this by submitting proposed findings of fact and conclusions of law. This is, it seems to me, the best way to get the facts down so we can get as much stipulated as possible.

So why don't we say that by May 6th the plaintiff's proposed findings of fact and conclusions of law will be served on Mr. MacCrate.

Have these in detail, just as much detail as you possibly can. A lot of conclusory general stuff won't serve the purpose. We are going to try to use this to work out a stipulation of as many facts as possible, Mr. Wasser.

Now, let's say that, Mr. McCrate, if you would, after you get Mr. Wasser's material, look at it and what you ought to do is, if you find that this is too general or doesn't go to the issues or something like that, why, just have another meeting. I don't want to have that time go by and end up with a lot of inconsequential stuff. But hopefully if Mr. Wasser's material is satisfactory, you and your associate can look at it and confer with Mr. Wasser and see what you can agree to. If he's used incorrect figures or something, incorrect here and there, you can tell

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him, correct him, and hopefully he will correct what he can, but you can end up agreeing on as much as possible through that process of discussions; and then to the extent you can't agree, then you can, in other words, file a response indicating what you can't agree, even after discussion, and your counter proposals as far as findings of fact. So we ought to come to trial with a list of agreed findings and then the plaintiff's proposed findings on things that can't be agreed on and the same for the defendant.

It would seem to me that your material, Mr. McCrate, should be filed on the 20th. Any help I can be to the process of stipulating, why you can come in. Maybe we won't have to have much of a trial. Is that okay?

MR. WASSER: Your Honor, I'm a little concerned with the time element. I hate to take up the time of this Court.

THE COURT: That's all right.

MR. WASSER: I know your schedule is very heavy. I'm seriously concerned with the May 6th period. In looking over these dates, I feel we might have to move to August, possibly move up each date proportionately and take our chances on survival, because if we had the funds at this point, there would be no problem in having everything we need in very short order, but we have made an estimate of

what was asked of us by the co-counsel who I wanted to help me at this phase, and it came to about a $25,000 fee before the trial.

Now, if the firm were functioning and in good order -- if it weren't for this matter, I believe we could afford the $25,000. I'm appearing strictly on a contingent basis because it was my regular client.

THE COURT: Let me ask you this: It's probably hard for you to predict. I don't want to make the pretrial so cumbersome that it bogs you down. At the same time, either we ought to have some pretrial so that we don't just flounder into a trial and just have a disorganized situation. How much or how little pretrial this case needs I really don't know. It could be very simple. If it is simple, though, it will be, you know, easy for everybody.

But I think I have got to have this done. This is one way, and it is not a bad way, to get the pretrial done.

MR. WASSER: I agree with everything you said except --

THE COURT: When do you think you could get your proposed findings; in other words, just get your case laid out so you could give me the materials? Do you think May 6th is too early?

MR. WASSER: Yes. In other words, I don't want to throw everyone off by coming back later on.

THE COURT: If we get much past May 6th we really can't try it in June, that's the trouble. Could you make it May 15th? That probably doesn't make enough difference to you.

MR. WASSERMAN: No. I would say that even if my client has to lay off people, we would have to try for an August date. This is my opinion based upon the work that I have done, the work that I have pr jected as to what would still have to be done. I spent a great deal of time on this case and I have a very small staff and I've been successful in many matters. So I think perhaps August --

THE COURT: I will do anything to try to meet the June 17th date, if you want to try to meet it. Or we can have it go over until August and that's about the best I can do.

MR. WASSER: I believe that August, between the two, disadvantages --

THE COURT: It's going to have to be late in August, because, Mr. MacCrate, when would you be able to do it?

MR. MacCRATE: I would request we might start

on the 28th of August.

THE COURT: Well, that is all right with me. 28th of August.

MR. WASSER: Right. Your Honor, if you would like to move all the dates back proportionately --

THE COURT: Well, let's move the dates. Let's just start all over again. Why don't we have the --

MR. MacCRATE: Off the record.

(Discussion off the record.)

THE COURT: We will set the trial date of August 28th and let's have the plaintiff's proposed findings. I want them while you are here and able to go over them. If I said the 8th of July --

MR. MacCRATE: I was going to suggest either the first or the 8th of July.

THE COURT: Let's say the 8th of July, and then the defendants' proposed findings would be two weeks after that, the 22nd of July, and let's have the plaintiff's trial brief the 29th of July; the defendant's trial brief the 12th of August.

When you get into the vacation and briefing and all, does that present any problem to you, Mr. MacCrate?

MR. MacCRATE: I believe we can meet that, your Honor.

THE COURT: All right. Because I think you pretty much know what you want to brief.

Okay. That makes sense.

MR. WASSER: I certainly appreciate your patience with this.

THE COURT: That's okay.

* * * * *

Memorandum Endorsement of Judge Griesa Withdrawing Plaintiff's Motion for Preliminary Injunction, March 18, 1974

(SDNY. ENDORSED)

U.S. DISTRICT COURT FILED MAY 21 1973 S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---x

FLE COLLISION PARTS, INC.,
Plaintiff

-against-

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,
Defendants

---x

73 Civ. 713 (TPG)

NOTICE OF MOTION

ORAL ARGUMENT REQUESTED

Sirs:

PLEASE TAKE NOTICE that upon the annexed affidavit of STEPHEN McKEE, Secretary-Treasurer of plaintiff, sworn to May 12th, 1973, and upon all of the pleadings and proceedings had herein, the undersigned will move this Court at a Motion Part hereof, at the United States Courthouse, Foley Square, New York, N.Y., on ~~May 24th,~~ JUNE 6TH 1973 at 10:00 A.M. or as soon as counsel can be heard, for a preliminary injunction restraining defendants from the continuing, during the pendency of this action, the acts referred to in paragraph 3 of said affidavit.

Yours, etc.

Dated: New York, New York
May 14th, 1973

BY David L Wasser
DAVID L. WASSER, ESQ.
Attorney for Plaintiff,
250 West 57th Street
New York, New York 10019

CIrcle 6 - 3880

TO:
ROBERT MAC CRATE, ESQ.
SULLIVAN & CROMWELL, ESQ.
Attorneys for defendants,
48 Wall Street
New York, New York 10005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FLM COLLISION PARTS, INC., Plaintiff
-against-
FORD MOTOR COMPANY and
FORD MARKETING CORPORATION, Defendants

73 Civ. 715 (IPG)
AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

State of New York }
County of Rockland } ss:

Stephen McKee, being duly sworn, depoces and says:

1. He resides at 15 Underwood Road, Monsey, New York, 10952 and is the Secretary-Treasurer and Chairman of the Board of Directors of the plaintiff in the above-entitled action.

2. This is an action under Sections 4 and 16 of the Clayton Act to recover damages and for injunctive relief due to defendants' violations of the Anti-Trust laws;

3. Defendants are continuing the practices discriminatory to plaintiff, as noted in paragraph 17 and elsewhere in plaintiff's complaint; because plaintiff must pay 26.0 per cent over the price available to "Ford" dealers and others favored by "Ford," plaintiff, commencing with the latter part of 1972, is incurring such extra costs in excess of $10,000 per month, the major portion of its gross profit rate has been deleted from its business, due to said discrimination, and it has been forced to obtain temporary, limited outside financing to remain in business, which financing, at best, will not be sufficient to enable plaintiff to stay in business until the culmination of this case.

4. Unless defendants are enjoined and restrained during the pendency of this action from the commission of the acts as above set forth, the plaintiff will suffer great and irreparable damage.

Sworn to before me this
14th day of May, 1973.

DAVID L. WASSER
NOTARY PUBLIC, State of New York
No. 66-4164300
Qualified in Rockland County
Commission Expires March 30, 1974

Motion withdrawn
So ordered

Thomas P Griesa

USDJ

3/18/74

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§3 OTHER PRE-TRIAL DEVELOPMENTS

Plaintiff's First Set of Interrogatories, March 18, 1974

1590

Rec'd by hand
4:35 p.m. March 15, 1974
R. C. Cannick

Response by 4/17/74

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FLM COLLISION PARTS, INC.,
Plaintiff,

-v-

FORD MOTOR COMPANY and
FOR MARKETING CORPORATION,
Defendants

73 Civ. 713 (TPG)

FIRST SET OF INTERROGATORIES TO THE DEFENDANTS FORD MOTOR COMPANY and FORDMARKETING CORPORATION

SIRS:

PLEASE TAKE NOTICE that the plaintiff, FLM COLLISION PARTS, INC ("FLM"), hereby requests that the defendant, FORD MOTOR COMPANY ("FOMO") and the defendant, FORD MARKETING CORPORATION ("FMC"), answer the following interrogatories in accordance with Rule 33 of the Federal Rules of Civil Procedure.

Definitions

Unless specifically indicated, or otherwise required by the context in which the terms, names and instructions are used, the following definitions shall be applicable herein:

A. "You" or "your" refers to the defendants and their subsidiaries, their predecessors and successors, their present and former directors, officers, agents, consultants, and employees, and all other persons acting or purporting to act on behalf of, or who are subject to the direction or control of any of the foregoing.

B. "Document" or "documents" means all written, printed, typed or other graphic matter, all mechanical and electronic sound recordings or transcripts thereof; all punch cards, magnetic tapes, discs, data cells, or any other electronic devices; and all print-outs and runoffs now, or at any time,

in your possession, custody or control or known to you, whether or not prepared by you. "Document" or "documents" include, but is not limited to, all agreements, memoranda, reports, notes, diaries, calendars, telephone bills, internal communications, inter-office communications, telegrams, letters, data, books, manuals, directives, bulletins, accounts, travel and expense accounts and reports, vouchers, invoices, bills, ledgers, financial statements, forecasts, appraisals, surveys, calculations, statistical statements, maps, charts, graphs, drawings, work sheets, minutes, and summaries of meetings, conversations, or communications of any type, including telephone conversations. "Document" or "documents" also includes all copies which are not identical with the original.

C. "Identify", when used with reference to a document, means state: the date and title of the document; the author or person or persons who prepared it; the type of document (e.g., letter, memorandum, telegram, chart, form, etc.); its present location and custodian; a summary of its principal purpose or provisions; the subject matter thereof; what parts of the information are contained on an electronic data processing system and an identification of such system, including the fields of data recorded therein; if a contract or agreement, the parties thereto, the dates of all modifications and amendments, and the date, if any, upon which it is authenticated; if a form, the form name and number and the periods during which it was in use. Identify all documents which were prepared that relate or refer to the document that you are requested to identify. If the document was, but is no longer in your possession, custody, or control, state what disposition was

made of it.

"Identify", when usedwith reference to an individual, means state his full name andpresent address, his present or last known position, and business affiliation, and his position and business affiliation during the time in question.

"Identify", when used with reference to a corporation, partnership, or other business concern, location or facility means state its full name and present business address.

"Identify", when used withreference to an act, transaction, action, or instance, means state: the date and time when it occurred; the place where it occurred; the identity of each person participating therein; on whose behalf each said person participated or purported to participate; the nature, subject matter, and circumstances surrounding it, and the nature and substance of all conversations or oral communications occurring during, or in connection with, it.

D. "Crash parts" means body parts for vehicles manufactured by the Ford Motor Company and its affiliates, contractors, subsidiaries or agents other than those body parts assembled into new vehicles prior to their sale.

E. "Dealers" means franchised Ford or Lincoln-Mercury dealers, not including those who are dealers in fact and not labelled as "franchised" dealers.

INTERROGATORIES

1. State the full name of your company, the nature of each of its business activities, the date and State of its incorporation, and the location of its principal place of business and the business activity carried on at each such location and the name under which such business is conducted if other than

your corporate name.

2. Identify each past and present officer and director of your company and each officer of any division thereof (excluding those who have not served in any such capacity since April 1, 1965).

3. With respect to each corporation of which your company owns fifty per cent or more of the voting securities, or which you company otherwise controls or has power to control, state:

(a) the full name of the corporation;

(b) the nature of each of its business activities;

(c) the date and state of its incorporation;

(d) the location of each of its principal places of business and the business and the business activity carried on at each such location;

(e) the date or dates upon which your company acquired or obtained its interest in the corporation, or the date upon which your company created the corporation; and

(f) identify each past and present officer and director of such corporation (excluding those who have not served in any such capacity since April 1, 1965).

4. Describe in detail the present organizational structure of your company and each variation thereof since April 1, 1965, and identify all documents referring or relating to any adoption, amendment, retention or variation of each such organizational structure. This description should include, but not be limited to, formal and informal divisions, subsidiaries, departments, profit centers, policy groups, advisory groups and committees.

5. Identify each person who has had management responsibility in each organizational unit of your company described in response to Interrogatory 4 since April 1, 1965.

6. Describe your distribution system of "crash parts", since April 1, 1965, including, but not limited to:

(a) Names of individuals who have prepared the system's rules, their duties, the manner of your control of the system, your method of communication and shipping to those who receive your "crash parts";

(b) Identify and describe with relation to said distribution system all documents and acts or transactions related to the circulation of manuals, price and distribution rules that you have issued since April 1, 1965, setting forth all discounts and/or credits given to purchasers or allowed on types of purchases and your instructions varying the credits and discounts dependent upon the disposition of the "crash parts" after your sale of same;

(c) Identify documents used in calculating discounts and credits on "crash parts" sold by you since April 1, 1965 and describe the calculations and the methods of setting up the discounts;

(d) Identify and describe all documents, acts or transactions, individuals or corporation who were involved in any way, or who received notice of (and the date of such notice) the change of your manual on July 1, 1971, wherein you redefined your criteria for an "eligible customer" for wholesale credit incentives of "crash parts".

7. With respect to each investigation, inquiry, proceeding or other matter, involving any aspect of the "crash parts" industry since April 1, 1965 to which you were a party (as plaintiff, defendant, claimant, or otherwise), or in which information was sought with respect to your activities, involving (a) the Antitrust Division of the Department of Justice, (b) the

Federal Trade Commission, (c) any claim or question under the antitrust laws of the United States or of any State or other jurisdiction, (d) any claim or question of (i) unfair trade practices or (ii) unfair competition set forth:

(A) the nature of the matter including but not limited to the claims asserted by the respective parties or the matters as to which inquiry was made;

(B) identify all parties thereto or participants in any aspect thereof;

(C) the date upon which you first became aware of the matter;

(D) the forum, court or agency involved or before which the matter was pending, and the title identifying numbers or other information with respect thereto necessary to adequately identify the matter or proceeding;

(E) identify (i) all pleadings, (ii) Civil Investigative Demands, (iii) Governmental Subpoenas or (iv) Requests for information received by you with respect to any of the foregoing matters and identify all documents produced by you in response thereto.

(F) your records of your compliance with all governmental regulatory agencies' orders, agreements, judgments, consent judgments related to you, including the Autolite-Ford Parts Division, since April 1, 1965, pertaining to crash parts or your methods of distribution, pricing relationship with dealers or other customers or others.

8. Describe and identify financing arrangements between you and any of your dealers, and the nature and organization of your "Dealer-Development system.

9. Identify, describe and relate the contents of all of

acts or transactions related to the sale of "crash parts" to "FLM" and the issuance or denial to "FLM" of wholesale incentive credits, stock order credits, obsolescence credits or other credits and discounts.

10. Identify, describe and relate the contents of all of your documents, acts or transactions since April 1, 1965 related to instructions, memos or suggestions to dealers, regarding the territorial areas wherein they may locate and sell.

11. Identify, describe and relate the contents of all documents and acts related to the formation and organization and/or discontinuance of the dealership operation of THOMAS MOTORS, INC. (Westchester County), CENTRAL LINCOLN MERCURY (later ATLAS LINCOLN MERCURY)(Kings County) and RUCKLES MOTORS (Westchester County), and with regard to their applications for dealerships, history of their performances, decisions to authorize or discontinue their dealerships and the reasons therefor; arrangements, correspondence or other data pertaining to communications between you and GENERAL MOTORS CORPORATION and/or AMERICAN MOTORS CORPORATION or their subsidiaries or affiliates, or other auto manufacturers, with regard to the organization of RUCKLE PONTIAC (Westchester County) in replacement of THOMAS MOTORS, INC. and/or the wholesale sales and warehousing of "crash parts" in a combined operation with the wholesale sales and warehousing of body replacements parts of GENERAL MOTORS CORPORATION and/or AMERICAN MOTORS CORPORATION.

12. Identify those individuals who are or were (since April 1, 1965) principals, officers, directors, employees or stockholders of FOMO or FMC who are or were (since April 1,1965) in any of these categories in THOMAS MOTORS, INC. or any other Ford or Lincoln Mercury dealer in the continental U.S.A., with

the number of shares of voting stock, if any, in the dealers and the percentage of said ownership in total outstanding voting shares of said dealers.

13. Identify any individualswho are, or have been principals, officers or directors in your corporation and also in any of these categories in other auto manufacturers (since April 1, 1965).

14. Describe all acts of audits conducted by you of the sales made by "FLM" and the credits allowable on these sales.

15. Identify, describe and relate the contents of all documents and acts of sale, with names of vendee, dates and amounts of sale, of all body parts manufactured by you since April 1, 1965 and sold by you to other than Ford or Lincoln Mercury dealers; include in your reply, all sales made to parties inside or outside of the continental U.S.A. and to exporters.

16. Describe, in detail, each policy which your company has followed with respect to the retention and destruction of documents at all times since April 1, 1965.

17. Identify each person who provided information in connection with the responses to these interrogatories and each interrogatory with respect to which he provided the said information.

DATED:

March 18th, 1974
New York, NY

By David L Wasser

DAVID L. WASSER
Attorney for Plaintiff
250 West 57th Street
New York, New York 10019
Tel. (212) Ci 6-3880

Defendants' Answers and Objections to Plaintiff's Interrogatories (First Series), April 17, 1974

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FIM COLLISION PARTS, INC.,

Plaintiff,

v.

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

73 Civ. 713 (TPG)

DEFENDANTS' ANSWERS AND OBJECTIONS TO PLAINTIFF'S INTERROGATORIES (FIRST SERIES).

General Objections

A. Defendants object to Definition "A" to the extent that it calls for information concerning "all other persons . . . purporting to act on behalf of [defendants]" on the grounds that discovery of such information from defendants is not authorized by the Federal Rules of Civil Procedure and that such information is not relevant to the subject matter of this action.

B. Defendants object to all interrogatories to the extent that they call for information concerning any period of time prior to February 15, 1969 on the grounds that such information is not relevant to the subject matter of this action, is not reasonably calculated to lead to the discovery of admissible evidence and that answers to the interrogatories including such information would unduly burden defendants.

C. Defendants object to interrogatories 1, 2, 3, 4, 5, 10, 12, 13, 15 and 16 to the extent that they call for information other than information concerning defendants' single source parts on the ground that such information is not relevant to the subject matter of this action, is not reasonably calculated to lead to the discovery of admissible evidence and that answers to the interrogatories including such information would unduly burden defendants.

4-17-74

D. Defendants object to Interrogatories 3, 8, 10, 12 and 15 to the extent that they seek information other than information concerning entities from whom plaintiff has purchased or attempted to purchase defendants' single source parts on the grounds that such information is not relevant to the subject matter of this action, is not reasonably calculated to lead to the discovery of admissible evidence and that answers to the interrogatories including such information would unduly burden defendants.

E. Defendants object to Interrogatories 4, 6, 8, 10, 11, 12, and 14 to the extent that they seek confidential information, including, but not limited to, cost, pricing and profit information of defendants, financial and personal information submitted to defendants by applicants for dealerships and participants in existent dealerships, and financial information concerning the performance of any such dealerships. Defendants object to requests for such information on the grounds that the production of defendants' own data would serve only to expose some of the most privileged and highly sensitive information which bears directly on the competitive aspects of their operations, that the information submitted to defendants by dealers and dealer applicants was submitted in confidence, and its production would constitute a breach of confidence and fiduciary duty, that all such information is not relevant to the subject matter of this action, is not reasonably calculated to lead to discovery of admissible evidence, and that answers to the interrogatories including such information would unduly burden defendants.

F. Defendants object to Interrogatories 4, 6 and 10, to the extent that they call for "all documents", or "all documents, acts or transactions" on the grounds that all such information is not material to the subject matter of this action, but merely cumulative, and that answers to the interrogatories

including all such information would unduly burden defendants. Defendants are, however, producing in response hereto such information as is reasonably calculated to lead to the discovery of admissible and material evidence. Defendants further offer to make available for inspection at Ford World Headquarters in Dearborn, Michigan and at the Ford Parts Divisi - in Livonia, Michigan at a mutually agreeable time such additional documents (other than documents subject to Objections A - E, supra) as hereafter are found to be relevant and material to the subject matter of this action.

G. Addresses of individuals identified in the answers to these interrogatories or in documents produced in response thereto will be provided to plaintiff upon request.

Interrogatory 1: "State the full name of your company, the nature of each of its business activities, the date and state of its incorporation, and the location of its principal place of business and the business activity carried on at each such location and the name under which such business is conducted if other than your corporate name."

Answer: Ford Motor Company ("Ford") was incorporated on July 9, 1919 as a corporation organized and existing under the laws of the State of Delaware with its principal place of business located at The American Road, Dearborn, Michigan 48121. The principal business activity of Ford is the manufacture and sale of automotive vehicles, and related parts and accessories.

Ford Marketing Corporation ("FMC") was incorporated on May 19, 1970 as a corporation organized and existing under the laws of the State of Delaware with its principal place of business located at 3000 Shaeffer Road, Dearborn, Michigan 48121. FMC is a wholly-owned subsidiary of Ford. The principal business activity of FMC is the sale of the automotive vehicles and related parts and accessories manufactured by Ford.

Interrogatory 2: "Identify each past and present officer and director of your company and each officer of any division thereof (excluding those who have not served in any such capacity since April 1, 1965) ~~[sic.]~~ dec."

Answer: See documents produced in response to Interrogatory 4, infra.

Interrogatory 3: "With respect to each corporation of which your company owns 50 percent or more of the voting securities, or which your company otherwise controls or has power to control, state:

(a) the full name of the corporation;

(b) the nature of each of those business activities;

(c) the date and state of its incorporation;

(d) the location of each of those principal places of business and the business and the business activity carried on at each such location;

(e) the date or dates on which your company acquired or obtained those interests in the corporation, or the date upon which your company created the corporation; and

(f) identify each past and present officer and director of such corporation (excluding those who have not served in any such capacity since April 1, 1965)."

Answer: I. Ford Marketing Corporation

(a) See answer to interrogatory 1, supra.

(b) See answer to interrogatory 1, supra.

(c) See answer to interrogatory 1, supra.

(d) See answer to interrogatory 1, supra.

(e) See answer to interrogatory 1, supra.

(f) See documents attached hereto in response to interrogatory 4, infra.

II. Thomas Motors, Inc.

(a) Thomas Motors, Inc.

(b) The sale of automotive vehicles and related parts and accessories, and servicing of automotive vehicles.

(c) August 14, 1967, Delaware.

(d) 201 S. Broadway, Yonkers, New York; see answer to (II) (b), above.

(e) See documents produced in response hereto.

(f) Present:

President	R. L. Crowder
V. President	B. V. Kirk
Sec-Treas.	P. V. Gallo
Asst. Sec.	J. T. Pierce
Asst. Sec.	C. C. Cochell
Directors	R. M. Copeland
	R. L. Crowder

Past:

Directors	J. F. Mallon
	I. H. Washburn
	C. E. Ciarelli
	D. C. Touzeau
	D. M. Costa
	J. M. Ermiger
President	R. T. Baldassare
V. President	J. S. Dewitt, Jr.
Sec-Treas.	John J. Liszewski
President/ Operator	T. W. Hooper
President/ Operator	Walter Fiveson
President/ Operator	W. J. Mahoney
President/ Operator	J. R. Newman

III. Parkview Lincoln-Mercury, Inc.

(a) Parkview Lincoln-Mercury, Inc.

(b) The sale of automotive vehicles and related parts and accessories, and servicing of automotive vehicles.

(c) December 15, 1967, Delaware

(d) 236 S. Broadway, Yonkers, New York; see answer to (III)(b), above.

(e) See documents produced in response hereto.

(f) Present:

President: R. S. Vogels

Past:

President	R. S. Vogels
V. President	B. V. Kirk
V. President	R. B. Kenyon
Sec-Treas.	Trevis Volpicelli
Sec-Treas.	S. G. McClellan, Jr.
Asst. Sec.	J. T. Pierce
Asst. Sec.	C. C. Cochell
Asst. Sec.	Perry Ashley
Asst. Sec.	R. L. Hamann

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Directors	R. S. Vogels
	J. F. Mallon
	J. M. Ermiger
	W. W. Moore
	E. M. Collins
	I. H. Washburn
	C. E. Ciarelli
	D. C. Touzeau
	D. M. Costa
Operator	R. S. Vogels

Interrogatory 4: "Describe in detail the present organizational structure of your company and each variation thereof since April 1, 1965, and identify all documents referring or relating to any adoption, amendment, retention or variation of each at the organizational structure. This description should include, but not be limited to, formal and informal divisions, subsidiaries, departments, project centers, policy groups, advisory groups, and committees

Answer: See documents produced in response hereto.

Interrogatory 5: "Identify each person who has had management responsibilities in each organizational unit of your company described in response to interrogatory 4 since April 1, 1965."

Answer: See documents produced in response to interrogatory 4, supra.

Interrogatory 6: "Describe your distribution system of "crash parts", since April 1, 1965, including, but not limited to:

(a) Names of individuals who have prepared the system's rules, their duties, the manner of your control of the system, your method of communication and shipping to those who receive your "crash parts";

(b) Identify and describe with relation to said distribution system all documents and acts or transactions related to the circulation of manuals, price and distribution rules that you have issued since April 1, 1965, setting forth all discounts and/or credits given to purchasers or allowed on types of purchases and your instructions varying the credits and discounts dependent upon the disposition of the "crash parts" after your sale of same;

(c) Identify documents used in calculating discounts and credits on "crash parts" sold by you since April 1, 1965 and describe the calculations and the methods of setting up the discounts;

(d) Identify and describe all documents, acts or transactions, individuals or corporation [sic.] who were involved in any way, or who received notice of (and the date of such notice) the change of your manual on July 1, 1971, wherein you redefined your criteria for an "eligible customer" for wholesale credit incentives of "crash parts"."

Answer:

(a) Procedures relating to the distribution of single source parts are prepared within the Supply & Distribution Office by, among others, the Administrative & Budgets Department - Ron Hoffman; and Controller's Office - Assistant Controller, Accounting - W. A. Beers. The duties of those individuals are reflected in the documents produced in response to interrogatory 4, supra. Only Ford, Lincoln, Mercury, Capri, Pantera, English Ford and Industrial Engine franchised dealers are eligible to buy single source parts from Ford or FMC. Such franchised dealers submit orders for such parts on which they must indicate a parts code number assigned by Ford Parts Division. The parts code number is

used to verify the eligibility of the dealer and as a means of control for shipping and billing. The orders are submitted to the Ford Parts Division. All such franchised dealers are subject to internal audits by members of a separate Ford audit unit. Methods of communication are teletype, letter, memoranda, manuals, telephone and face-to-face conversations. Shipments are by rail, truck, and air to Parts Distribution Centers. See documents produced in response to Interrogatories 6(b) and 6(c), infra.

(b) See documents produced in response hereto, and in response to interrogatory 6(c), infra.

(c) See documents produced in response hereto and in response to Interrogatory 6(b), supra.

(d) See documents produced in response hereto.

Interrogatory 7: "With respect to each investigation, inquiry, proceeding or other matter, involving any aspect of the "crash parts" industry since April 1, 1965 to which you were a party (as plaintiff, defendant, claimant, or otherwise), or in which information was sought with respect to your activities, involving (a) the Antitrust Division of the Department of Justice, (b) the Federal Trade Commission, (c) any claims or question under the antitrust laws of the United States or of any State or other jurisdiction, (d) any claim or question of(i) unfair trade practices or (ii) unfair competition set forth:

(A) the nature of the matter including but not limited to the claims asserted by the respective parties or the matters as to which inquiry was made;

(B) identify all parties thereto or participants in any aspect thereof;

(C) the date upon which you first became aware of the matter;

(D) the forum, court or agency involved or before which the matter was pending, and the title identifying numbers or other information with respect thereto necessary to adequately identify the matter or proceeding;

(E) identify (i) all pleadings, (ii) Civil Investigative Demands, (iii) Governmental Subpoenas or (iv) Requests for information received by you with respect to any of the foregoing matters and identify all documents produced by you in response thereto.

(F) your records of your compliance with all governmental regulatory agencies' orders, agreements, judgments, consent judgments related to you, including the Autolite-Ford Parts Division, since April 1, 1965, pertaining to crash parts or your methods of distribution, pricing relationship with dealers or other customers or others."

Answer: Defendants object to this interrogatory which is a wide-ranging exploration seeking information about proceedings entirely unrelated to this action to which plaintiff is not a party and which plaintiff makes no attempt to relate to this action, on the grounds that the information sought thereby is not relevant to the subject matter of this action, is not reasonably calculated to lead to the discovery of admissible evidence and that an answer to this interrogatory including such information would unduly burden defendants.

Interrogatory 8: "Describe and identify financing arrangements between you and any of your dealers, and the nature and organization of your 'Dealer-Development system."

Answer: See documents produced in response hereto, and in response to Interrogatories 3 and 12, infra.

Interrogatory 9: "Identify, describe and relate the contents of all of [sic.] acts or transactions related to the sale of "crash parts" to "FLM" and the issuance or denial to "FLM" of wholesale incentive credits, stock order credits, obsolescence credits or other credits and discounts."

Answer: Except for the documents produced in response hereto and in response to Interrogatory 6, supra, defendants have no knowledge of any act or transaction related "to the sale of 'crash parts' to 'FLM'". FMC sells "crash parts" to its franchised dealers. Upon information and belief, defendants believe that certain of those dealers have sold single source parts to FLM.

Interrogatory 10: "Identify, describe and relate the contents of all of your documents, acts or transactions since April 1, 1965 related to instructions, memos or suggestions to dealers, regarding the territorial areas wherein they may locate and sell."

Answer: Defendants object to this interrogatory to the extent that it seeks information concerning "documents, acts or transactions" related to the physical locations of dealerships, on the grounds that the information sought thereby is not relevant to the subject matter of this action, is not reasonably calculated to lead tc the discovery of admissible evidence and that an answer to this interrogatory including such information would unduly burden defendants. There are no territorial restrictions on the sale of single source parts by defendants' dealers.

Interrogatory 11: "Identify, describe and relate the contents of all documents and acts related to the formation and organization and/or discontinuance of the dealership operation of THOMAS MOTORS, INC. (Westchester County), CENTRAL LINCOLN MERCURY (later ATLAS LINCOLN MERCURY)(Kings County) and RUCKLES MOTORS (Westchester County), and with regard to their applications for dealerships, history of their performances, decisions to authorize or discontinue their dealerships and the reasons therefor; arrangements, correspondence or other data pertaining to communications between you and GENERAL MOTORS CORPORATION and/or AMERICAN MOTORS CORPORATION or their subsidiaries or affiliates, or other auto manufacturers, with regard to the organization of RUCKLE PONTIAC (Westchester County) in replacement of THOMAS MOTORS, INC. and/or the wholesale sales and warehousing of "crash parts" in a combined operation with the wholesale sales and warehousing of body replacements parts of GENERAL MOTORS CORPORATION and/or AMERICAN MOTORS CORPORATION."

Answer: See documents produced in response to Interrogatory 3, supra.

Interrogatory 12: "Identify those individuals who are or were (since April 1, 1965) principals, officers, directors, employees or stockholders of FOMO or FMC who are or were (since April 1, 1965) in any of these categories in THOMAS MOTORS, INC. or any other Ford or Lincoln Mercury dealer in the continental U.S.A., with the number of shares of voting stock, if any, in the dealers and the percentage of said ownership in total outstanding voting shares of said dealers."

Answer: I. Thomas Motors, Inc.

Directors:	J. F. Mallon
	R. M. Copeland
	I. H. Washburn
	C. E. Ciarelli
	D. C. Touzeau
	D. M. Costa
	J. M. Ermiger
Officers:	J. S. Dewitt, Jr.
	T. W. Hooper
	W. J. Mahoney

II. Parkview Lincoln-Mercury, Inc.

Directors:	W. W. Moore
	E. M. Collins
	I. H. Washburn
	C. E. Ciarelli
	D. C. Touzeau
	D. M. Costa
	J. F. Mallon
	J. M. Ermiger
Officers:	R. L. Hamann

See documents produced in response hereto.

Interrogatory 13: "Identify any individuals who are, or have been principals, officers or directors in your corporation and also in any of these categories in other auto manufacturers (since April 1, 1965)."

Answer: There are no such individuals.

Interrogatory 14: "Describe all acts of audits conducted by you of the sales made by "FLM" and the credits allowable on these sales."

Answer: See documents produced in response to Interrogatory 9, supra.

Interrogatory 15: "Identify, describe and relate the contents of all documents and acts of sale, with names of vendee, dates and amounts of sale, of all body parts manufactured by you since April 1, 1965 and sold by you to other than Ford or Lincoln Mercury dealers; include in your reply, all sales made to parties inside or outside of the continental U.S.A. and to exporters."

Answer: Defendants have not sold in the United States any single source parts manufactured by Ford to other than their Ford, Lincoln, Mercury, Capri, Pantera, English Ford or Industrial Engine franchised dealers.

Interrogatory 16: "Describe, in detail, each policy which your company has followed with respect to the retention and destruction of documents at all times since April 1, 1965."

Answer: See documents produced in response hereto.

Interrogatory 17: "Identify each person who provided information in connection with the responses to these interrogatories and each interrogatory with respect to which he provided the said information."

Answer: The following individuals and people under their supervision, direction or control provided information in connection with responses to these Interrogatories:

(1) William Chlopan - Interrogatories 10, 11, and 16

(2) M. H. Hayward - Interrogatories 3, 8, 10, 11 and 16

(3) J. P. Krider - Interrogatories 2, 4, 5, 6, 9, 14, 15 and 16

(4) John Mallon - Interrogatories 3, 8, 10, 11, and 12

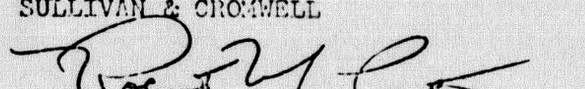
(5) R. E. Matyn - Interrogatory 16

(6) L. J. Reynolds - Interrogatories 6, 9 and 14

(7) Janet Wardwell - Interrogatories 2, 4, and 5

(8) William A. Zolbert - All interrogatories.

SULLIVAN & CROMWELL



(A member of the Firm)
48 Wall Street
New York, New York 10005
(212) 952-8100

STATE OF MICHIGAN)
: ss.
COUNTY OF WAYNE)

D. R. JOLLIFFE, being duly sworn, deposes and says that he is an Assistant Secretary of Ford Motor Company and Secretary of Ford Marketing Corporation, the defendants in the above-entitled cause, and that he signs the foregoing Answers to Interrogatories for and on behalf of said defendants and is duly authorized so to do; that many of the matters stated in the foregoing Answers are not within the personal knowledge of deponent and that deponent is informed by counsel that there is no Officer of defendants who has personal knowledge of all such matters; that the facts stated in said Answers have been assembled by authorized employees and counsel of defendants and deponent is informed by said counsel that the facts stated in said Answers are true.

D. R. Jolliffe

Subscribed and sworn to before me
this 17th day of April, 1974.

Virginia Garrity
Notary Public

Acting in the County of Wayne, State of Michigan
My commission expires:

VIRGINIA GARRITY
Notary Public, Wayne County, Mich.
My Commission Expires Apr. 11, 1975

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

FLM COLLISION PARTS, INC.,

Plaintiff,

-against- : 73 Civ. 713 (TPG)

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

- x

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

GEORGE A. SCHOLZE, being duly sworn, deposes and says that he is an attorney associated with Sullivan & Cromwell attorneys for Defendant Ford Motor Company; that on the 17th day of April, 1974 he caused the within Defendants' Answers and Objections to Plaintiff's Interrogatories to be served upon David L. Wasser, Esq., attorney for plaintiff, by having a true copy of the same securely enclosed in a post-paid wrapper to be deposited in the Post-Office Box regularly maintained by the United States Government at 48 Wall Street, Borough of Manhattan, City and State of New York, directed to said David L. Wasser, Esq. at 250 West 57th Street, New York, N.Y. 10019, that being the address within the state designated by him for that purpose upon the preceding papers in this action.

GEORGE A. SCHOLZE

Sworn to before me this
18th day of April, 1974

Notary Public

EILEEN L. FRANKLYN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31-130-3130
Qualified in New York County
Commission expires March 30, 1976

CIVIL ACTION NO. 73 Civ. 713 (TPG)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF
NEW YORK

FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

DEFENDANTS' ANSWERS AND OBJECTIONS TO PLAINTIFF'S INTERROGATORIES (FIRST SERIES)

SULLIVAN & CROMWELL
48 WALL STREET, NEW YORK, N. Y. 10005
952-8100
ATTORNEYS FOR
Defendants

Ford Motor Company and Ford Marketing Corporation.

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Plaintiff's Findings of Fact and Conclusions of Law (Proposed), July 5, 1974

((√ Warren Ex 13

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FLM COLLISION PARTS, INC.,
Plaintiff

-against-

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,
Defendants

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73 CIV. 713 (TPG)

Findings of Fact and Conclusions of Law (Proposed)

This action having been tried upon the facts by the Court without a jury, the Court does hereby find the facts and state separately its conclusions of law thereon, and directs the entry of the appropriate judgment, as follows:

Findings of Fact

7/5/74

1. Plaintiff, since its inception in April, 1965 and to date, has been in business as a wholesaler and jobber and technical adviser in the sale of wholesale Ford "crash" (body) parts, specializing in the storage of said parts and same day delivery service to body shops.

2. Plaintiff, since its inception in April, 1965 and to date, has received its supply of Ford "crash" parts as a wholesaler-jobber

(a) under agreements and arrangements with franchised dealers of defendants, and

(b) with the knowledge of defendants.

3. (a) Between November 1, 1968 and November 5,1972, defendants sold crash parts to its franchised dealers at a price less than its regular price by an amount approximating 25 per cent of defendants' suggested list price on sales made by the dealers to outside body shops or to independent wholesaler-jobbers. This wholesale pricing plan was instituted by defendants at the behest of the Federal Trade Commission.

(b) On January 1,1972, defendants unilaterally and

without notice to or agreement with the plaintiff or the Federal Trade Commission, redefined its criteria for an "eligible customer" in manuals then and subsequently printed and issued to its dealers by defendants, eliminating the plaintiff as an "eligible customer" by said redefinition, thereby removing the credit given to defendants' dealers on sales made by them to the plaintiff, thus effecting a punitive price increase against the plaintiff which had the result, when activated against the plaintiff in November,1972, of prohibiting dealers from reselling to plaintiff under terms profitable to plaintiff, thereby effectively eliminating the plaintiff as a competitor in the sale of Ford "crash" parts.

4. Upon the removal by defendants of plaintiff as an "eligible" customer, the Ford franchised dealer through whom the plaintiff had obtained its principal source of Ford "crash" parts, refused to further supply Ford "crash" parts to the plaintiff, and the plaintiff has had to seek its supplies from the defendants by making arrangements with a limited number of franchised dealers, said arrangements having included short and burdensome credit terms and cost percentage increases by the dealers in addition to the defendants' price increase on sales to the plaintiff which arose when the plaintiff was removed from the"eligible customer" list.

5. Plaintiff has been damaged in the sum of three million ($3,000,000)dollars.

6. The conduct of the defendants is in violation of the federal anti-trust laws.

Conclusions of Law

1. The defendants' prohibition against the resale of their "crash" parts by their dealers to the plaintiff, except

under punitive price increases to those dealers, and having the effect of destroying the plaintiff's business and eliminating the plaintiff as a competitor in the sale of Ford "crash" parts, is an unreasonable restraint of trade.

2. The defendants' effective limitation upon supply outlets available to the plaintiff, coupled with their refusal to deal directly with the plaintiff, has the effect of excluding the plaintiff, an independent wholesaler, from the distribution of Ford "crash" parts, creating thereby a substantial interference with commerce.

3. An injunction should be granted compelling the defendants to continue their operation with their franchised dealers as they did between November 1,1968 and November 5, 1972, so that the plaintiff can continue as a competitor of Ford's franchised dealers in the sale of Ford's "crash" parts.

4. Judgment in the sum of nine million ($9,000,000) dollars should be entered in favor of the plaintiff and against the defendants, arrived at as follows:

Three million ($3,000,000) dollars compensatory damages trebled as provided by the federal antitrust laws,

together with attorneys' fees, costs and disbursements.

July 5th,1974

Stackell & Stackell,
by Lewis B. Stackell,
Lewis B. Stackell
Of Counsel

Respectfully submitted,
David L. Wasser
David L. Wasser,
Attorney for Plaintiff,
Office & Post Office Address
250 West 57th Street,
New York, N.Y.10019
212 CI-6-3880

Defendants' Proposed Findings of Fact and Conclusions of Law, July 22, 1974

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

73 Civ. 713 (TPG)

- x

DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. Plaintiff FLM Collision Parts, Inc. ("FLM") is a corporation organized and existing under the laws of the State of New York with its principal place of business in Yonkers, New York.

2. Since its incorporation in April 1965, the business of FLM has included the purchasing of Ford, Lincoln and Mercury "crash" parts from franchised Ford and Lincoln-Mercury dealers ("franchised dealers") and the reselling of those parts to others, including independent garages, service stations and repair or "body" shops engaged in automotive service and repair work.

3. Defendant Ford Motor Company ("Ford") is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Dearborn, Michigan and is primarily engaged in the manufacture and sale of automotive vehicles and related parts and accessories.

4. Ford, Lincoln and Mercury crash parts are manufactured only by Ford or by other manufacturers using

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dies owned by Ford who make the parts to Ford's specifications and sell them only to Ford and FMC.

5. Ford, Lincoln and Mercury crash parts are used in the repair and replacement of parts on Ford, Lincoln and Mercury vehicles and include fenders, grills, hoods, deck lids, door panels, quarter panels, rocker panels and body side mouldings, all custom-designed and manufactured for particular years and models of vehicle.

6. Crash parts are to be distinguished from other automotive parts (such as batteries, spark plugs and filters) which are manufactured by different manufacturers for use on vehicles of various manufacturers and which are available from the manufacturer of the vehicles in which they can be used and other sources.

7. Defendant Ford Marketing Corporation ("FMC"), a wholly owned subsidiary of Ford, is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Dearborn, Michigan.

8. FMC was organized and incorporated in 1970 and since July 1970 has been engaged in the sale of Ford, Lincoln and Mercury automobiles manufactured by Ford and related parts and accessories manufactured by Ford and others, which marketing functions had previously been performed by Ford itself.

9. Since July 1970 Ford has sold crash parts for Ford, Lincoln and Mercury vehicles (except for export from the United States or directly to the Federal government) only to FMC.

10. FMC at all times has sold crash parts for Ford, Lincoln and Mercury vehicles (except for export from the United States or directly to the Federal government) only to franchised Ford and Lincoln-Mercury dealers for use in their own body shop repair operations and for resale.

11. With respect to the sale of crash parts by FMC to franchised dealers, neither FMC nor Ford has placed or attempted to place any restriction or control on franchised dealers as to the territory in which they may resell crash parts, the purchasers to whom they may resell or the terms and prices at which they may resell.

12. Ford and Lincoln-Mercury franchised dealers who purchase crash parts from FMC are free to resell such parts to anyone, on any terms and at any price they choose.

13. FMC stocks Ford, Lincoln and Mercury crash parts for all models for at least the five most recent model years and its maintained stock of automotive parts at any time exceeds 240,000 different parts.

14. Approximately 200,000 different automotive parts are available through FMC's National Parts Distribution Center; approximately 42,000 different parts are available through FMC's Master Parts Distribution Centers; and approximately 14,000 different parts are available through its Class A Depots.

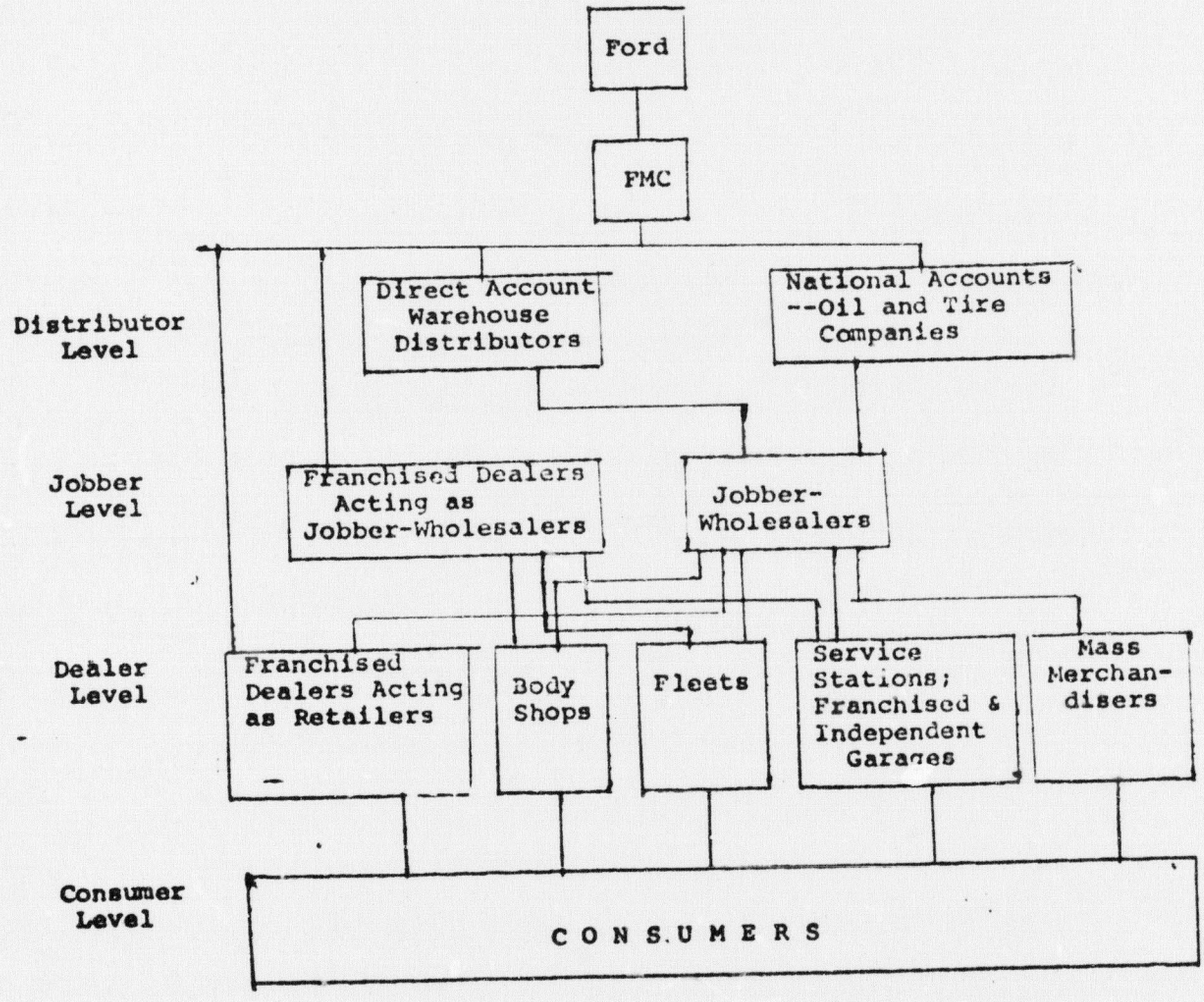
15. FMC distributes automotive parts through these channels of distribution, selling all parts to franchised dealers and selling a limited number of large volume parts (such as batteries, spark plugs and filters) to independent distributors known as direct account warehouse distributors and national accounts, primarily oil and tire companies, as well as to franchised dealers.

16. FMC sells automotive parts to approximately 6,800 franchised dealers, to approximately 1,000 direct account warehouse distributors and to approximately 40 national accounts throughout the United States at prices and on terms published in the Ford and FMC Master Price

Lists and in the Policy and Procedure Manual and the method and policy of distribution are established on a uniform basis nationally.

17. The Ford and FMC Master Price Lists and Policy and Procedure Manual provide a functional pricing system for automotive parts based upon the function performed by the buyer in the distribution of the particular parts.

18. The functional levels of distribution for all automotive parts under the Ford and FMC pricing system are accurately presented diagramatically as follows:



19. The Master Price Lists show the prices from time to time for automotive parts sold to franchised dealers, warehouse distributors and national accounts and show in particular the prices at which parts are sold to franchised dealers acting as retailers from which base prices the prices charged to franchised dealers acting in other capacities are computed.

20. Pursuant to the Policy and Procedure Manual, FMC allows the following discounts, allowances and credits to franchised dealers with respect to sales of crash parts:

a. Stock order discount;

b. Wholesale incentive allowance;

c. Parts obsolescence protection program credit ("POPP"; permits return of obsolescent parts for full credit of up to 5% of purchases); and

d. Surplus inventory reduction program credit ("SIRP"; permits return of surplus parts for partial credit of up to 3% of purchases).

21. The wholesale incentive allowance is granted to franchised dealers by FMC pursuant to the Policy and Procecure Manual with respect to parts resold by such dealers to body shops, service stations and independent garages in connection with which resales the dealers act as jobber-wholesalers rather than as retailers.

22. The wholesale incentive allowance was initially established for crash parts effective November 1, 1968 at the behest of the Federal Trade Commission to assist independent body shops, garages and service stations in purchasing such parts at prices comparable to those paid by franchised dealers for such parts when used in the franchised dealers' own body shops.

23. When the wholesale incentive allowance was

initially established for crash parts, it was allowed pursuant to the policy and Procedure Manual for all resales of such parts by franchised dealers except, in keeping with its theory and objective as conceived by the Federal Trade Commission, it was not allowed for parts used in the franchised dealers' own repair and service operations or for parts sold to another franchised dealer.

24. In accordance with a letter notice of June 23, 1971, effective July 1, 1971, the general policy for the wholesale incentive allowance pursuant to the Policy and Procedure Manual was amended to limit its allowance for resales by franchised dealers to those situations in which they acted as jobber wholesalers selling directly to retailers (other than franchised dealers) engaged in automotive service or repair work.

25. All discounts, allowances and credits with respect to sales by FMC of crash parts are credited or paid directly to the franchised dealers to whom such parts are sold by FMC.

26. Franchised dealers individually decide the prices at which they resell and the terms on which they resell crash parts to their customers and they may or may not elect to reflect in whole or in part in their prices and terms of sale any discount, allowance or credit they receive from FMC with respect to their purchases of crash parts.

27. Whether a franchised dealer reflects in its prices or in its terms of sale any portion of any discount, allowance or credit received by it from FMC does not affect the receipt by the franchised dealer of any such discount, allowance or credit.

28. Neither Ford nor FMC controls or attempts to control the election by franchised dealers as to whether or not the prices at which they resell and the terms on which they resell crash parts reflect any discount, allowance or credit received by such franchised dealers from FMC.

29. FLM has purchased crash parts at various times from 1965 to date from various franchised dealers including the following:

a. Central Lincoln-Mercury ("Central")
Brooklyn, New York
(name changed to Atlas Lincoln-Mercury ("Atlas") in July 1972)

b. Thomas Motors, Inc.
Yonkers, New York

c. Parkview Lincoln-Mercury
Yonkers, New York

d. Pleasantville Ford
Pleasantville, New York.

30. Although FLM claims that Atlas effective November 1, 1972 discontinued selling crash parts to FLM, neither Ford nor FMC participated in any such decision of Atlas and FMC expressly informed Atlas at the time that Atlas was free to continue selling crash parts to FLM if Atlas chose to do so.

31. Although FLM claims that Thomas Motors, Inc. effective June 4, 1973 discontinued selling crash parts to FLM, neither Ford nor FMC participated in any such decision of Thomas Motors, Inc.

32. Although FLM claims that the franchised dealers from which it has bought crash parts have from time to time changed the terms and prices upon which such sales were made, neither Ford nor FMC participated in any such decisions by franchised dealers to change the terms and prices at which such parts were sold by the franchised dealers.

33. From November 1, 1968 to June 30, 1971, any franchised dealer reselling crash parts to FLM would have been entitled to claim wholesale incentive allowance for any such resales, but effective July 1, 1971, with the

amendment of the general policy for the wholesale incentive allowance limiting it to resales made by franchised dealers to retailers (other than franchised dealers) engaged in automotive service or repair work, a franchised dealer was no longer entitled to claim wholesale incentive allowance for resales to FLM.

34. Despite the amendment of the general policy for the wholesale incentive allowance effective July 1, 1971, Central and Atlas continued to claim credits for wholesale incentive allowance for resales to FLM until November 1, 1972 because the responsible personnel of Central and Atlas did not realize that amendment of the general policy regulating the wholesale incentive allowance had made such resales ineligible for the wholesale incentive allowance.

35. Despite the amendment of the general policy regulating the wholesale incentive allowance effective July 1, 1971, FMC continued to give credits for wholesale incentive allowance to Central and Atlas for sales to FLM until November 1, 1972 because the responsible personnel of FMC did not realize until October 1972 that Central and Atlas were continuing to claim credits for wholesale incentive allowance for resales for which Central and Atlas were not entitled to claim such credits.

36. When the error in giving credits for wholesale incentive allowance for resales to FLM was discovered by responsible personnel of FMC the granting of such credits was promptly terminated and since November 1, 1972 no franchised dealer has received credits from FMC for wholesale incentive allowance for resales to FLM.

37. Although the credits for wholesale incentive allowance for resales to FLM by Central and Atlas from

July 1, 1971 to November 1, 1972 had been improperly given, FMC did not recover any portion of the credits for that period from Central and Atlas due to the fact that the error appeared to have been made by the franchised dealer in good faith and FMC had failed to act earlier to stop this improper claiming of the wholesale incentive allowance.

38. Although Ford and FMC personnel prior to November 1, 1972 had examined FLM's records of its purchases of crash parts from Central and Atlas, the sole purpose of such examinations was to verify the accuracy of the claims for credits for wholesale incentive allowance submitted by Central and Atlas to FMC.

39. FMC maintains a Master Parts Distribution Center in Teterboro, New Jersey, for the metropolitan New York area.

40. Customers of a franchised dealer are permitted by FMC to pick up parts which the customers are purchasing from the franchised dealer directly from the Teterboro Master Parts Distribution Center if they have obtained written authority to do so from the franchised dealer from whom the parts are being purchased; however, FMC bills the franchised dealer for any parts thus delivered to the dealer's customer and the dealer in turn obtains payment from its customer.

41. For all sales by FMC of crash parts it bills the franchised dealer for the purchase price of the parts and the dealer alone is liable to FMC therefor and any risk of non-payment by the dealer's customer is borne solely by the dealer.

42. At all times since 1965 FLM has been able to buy crash parts from franchised Ford and Lincoln-Mercury

dealers and at no time has it been prevented from purchasing such parts as it wished to buy.

43. FLM's sales of Ford, Lincoln and Mercury crash parts has increased each year it has been in business and its gross sales as recorded in its books of account for each of its fiscal years (ending September 30th) have been as follows:

Year	Gross Sales
1965 (six months)	$31,670
1966	245,739
1967	337,257
1968	389,987
1969	483,015
1970	620,769
1971	654,382
1972	736,937
1973	798,947

44. Neither Ford nor FMC has taken any action at any time for the purpose of injuring FLM nor have they committed any acts which have injured FLM.

45. It would work an enormous hardship upon Ford and FMC and disrupt their relationships with the approximately 6,800 franchised Ford and Lincoln-Mercury dealers, were the changes demanded by FLM in the nationwide distribution system for crash parts ordered to be made.

Conclusions of Law

1. This Court has jurisdiction over this action and over the parties.

2. Ford and FMC are entitled to determine the means by which they will sell Ford, Lincoln and Mercury automotive crash parts and it is expressly sanctioned by Section 2(a) of the Robinson-Patman Act and judicial decisions for FMC to limit its sales of such parts to franchised Ford and Lincoln-Mercury dealers.

3. A claim for relief under Section 2(a) of the Robinson-Patman Act may be maintained by a plaintiff only against a defendant from whom plaintiff has actually purchased a commodity; since FLM has never purchased crash parts from the defendants, its complaint fails to state a claim upon which relief can be granted.

4. Under the so-called indirect purchaser doctrine a plaintiff may sue a defendant which sells commodities to it through an intermediary only if plaintiff can demonstrate that it has dealt directly with defendant in purchasing the commodities or that defendant controls the prices, selling policies and selection of customers of the intermediary.

5. The system of discounts, allowances and credits allowed by FMC to franchised dealers on purchases of crash parts and any contacts by defendants with franchised dealers do not amount to an exercise of control by Ford or FMC over the resale of crash parts by franchised dealers or over the terms of such resales to FLM sufficient to satisfy the requirements of the so-called indirect purchaser doctrine.

6. Since defendants have had no solicited dealings with FLM at any time and have exercised no control over the prices, selling policies and selection of customers by the franchised dealers in their sales of crash parts, FLM can make no claim against the defendants under the so-called indirect purchaser doctrine and its complaint fails, also for this reason, to state a claim upon which relief can be granted.

7. Any differences in the resale prices at which Ford, Lincoln and Mercury crash parts are sold by FMC are neither reasonably calculated to lessen competition nor tend to create a monopoly nor tend to injure, destroy or prevent competition and, accordingly, FLM's complaint fails to state a claim on which relief can be granted.

8. Defendants have not entered into any contract, combination or conspiracy in restraint of trade or commerce in Ford, Lincoln and Mercury crash parts.

9. Defendants have not unlawfully monopolized, attempted to monopolize or combined or conspired to monopolize any part of the trade or commerce in Ford, Lincoln and Mercury crash parts.

10. Defendants have not acquired, directly or indirectly, the whole or any part of the stock or other share capital or the whole or any part of the assets of any other corporation where, in the line of commerce consisting of the distribution of Ford, Lincoln and Mercury crash parts, the effect of such acquisition might have been substantially to lessen competition or to tend to create an unlawful monopoly.

11. The acts of defendants complained of by plaintiff do not violate the antitrust laws of the United States and defendants are not liable to plaintiff.

12. A voluntary middleman such as FLM in a distribution system for a commodity has no vested right to the protection of the particular role which the middleman has sought to play in distributing the commodity.

13. FLM has established no basis in equity for any injunctive relief against either Ford or FMC.

14. Judgment should be entered in favor of defendants on the merits and dismissing the complaint.

Dated: July 22, 1974
New York, New York

Respectfully submitted,

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Robert MacCrate,
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Of Counsel.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

73 Civ. 713

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

- x

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

GEORGE A. SCHOLZE, being duly sworn, deposes and says that he is an attorney associated with Sullivan & Cromwell, attorneys for Defendant Ford Motor Company; that on the 22nd day of July, 1974 he caused the within proposed findings and conclusions to be served upon David L. Wasser, Attorney for plaintiff, by have a true copy of the same delivered to said attorney at 250 West 57th Street, New York, N.Y. 10019, by leaving the same with a person in charge of said office.

Sworn to before me this
22nd day of July, 1974

EILEEN L. FRANKLYN

Notary Public

EILEEN L. FRANKLYN
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-1303130
Qualified in New York County
Commission Expires March 30, 1975

NOTARIAL SEAL

CIVIL ACTION NO. 73 Civ. 713 (CSC)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF
NEW YORK

FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

SULLIVAN & CROMWELL
48 WALL STREET, NEW YORK, N. Y. 10005
952-8100
ATTORNEYS FOR
Defendants
FORD MOTOR COMPANY and FORD
MARKETING CORPORATION

210a

210A

Plaintiff's Pre-Trial Memorandum of Law,
August 21, 1974

ENTERED

Warren Ex 16

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

73 Civ. 71[illegible] (TPG)

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,

Defendants.

PLAINTIFF'S PRETRIAL MEMORANDUM OF LAW

5/21/74

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

73 Civ. 713
(TPG)

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,

Defendants.

----------x

PLAINTIFF'S PRETRIAL MEMORANDUM OF LAW

Statement of Facts

In 1965, Stephen McKee and John Andidero founded and incorporated FLM Collision Parts, Inc. (FLM), the plaintiff herein. The primary and now sole business of FLM is in selling replacement parts for Ford, Mercury and Lincoln automobiles. The parts dealt in by the plaintiff are usually 'crash parts', that is, replacement parts such as bumpers, fenders, etc., which are required by body shops to make repairs to vehicles after they have been involved in a collision.

Ford Motor Company is the manufacturer and sole source for the products dealt in by the plaintiff. In or about 1970, Ford created a new corporation wholly owned by Ford, through which it would market its replacement parts. That new corporation being the defendant, Ford Marketing Corporation.

Both prior to and after the creation of the Ford Marketing Corporation, Ford would sell its parts only to franchised Ford dealers who in turn would sell the parts to independent body shops and garages.

In 1968, Ford was advised by the Federal Trade Commission that its method of distribution of crash parts was giving Ford franchises an unfair competitive advantage over independent body shops since the independent body shops had to purchase the crash parts in question from the same franchised Ford dealers with whom they were, at the same time, competing for repair work.

In response to the urgings of the Commission, Ford Motor Company announced on November 1, 1968 the establishment of what it termed a wholesale incentive on crash parts. In essence, the wholesale incentive is an additional discount which Ford will provide to its franchised dealers to compensate them for the distribution of crash parts to the general trade at the same price at which those parts were available to Ford franchises operating repair shops.

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In practice, this wholesale incentive was supposed to provide a customer purchasing Ford crash parts from a franchised Ford dealer an additional discount of approximately 16 percent on all parts which were purchased.

The plaintiff FLM entered into arrangements with various Ford dealers whereby it would purchase large amounts of Ford parts from them at three percent over dealers' cost and then resell those parts to independent body and repair shops in the New York City area, especially those repair shops located in Bronx County. The plaintiff's arrangement with the various Ford dealers with whom it was dealing was that the plaintiff would pick up the parts it had bought directly from the Ford warehouse located in Teterboro, New Jersey.

Throughout this period until October, 1972, the plaintiff pursued its business of acting as a distributor of Ford crash parts to independent repair shops in the New York City area. The plaintiff would purchase these parts from franchised Ford dealers at a price which provided the plaintiff with the wholesale incentive which the Ford dealers were receiving from the defendants.

In late 1971, Ford issued a bulletin, No. 900, which became effective as of January 1, 1972, with regard to its policies

concerning the wholesale incentives it was offering to franchised Ford dealers. In essence, Bulletin No. 900 directed all franchised Ford dealers that as of January 1, 1972, all parts which were sold to dealers such as the plaintiff would not be eligible for the wholesale incentive or, to put it simply, that the plaintiff would now have to pay an additional 16 percent for all Ford crash parts which it purchased.

In October, 1972, an order the plaintiff had placed for parts was rejected at the Ford warehouse. The plaintiff contacted the Ford franchised dealer with whom it had been dealing and was advised that the defendants had directed him to discontinue doing business with the plaintiff.

The plaintiff then contacted two other franchised Ford dealers, Thomas Motors and Parkview Lincoln-Mercury, in both of which franchises Ford owns a controlling interest, and was advised by both of these dealers that they would sell to the plaintiff but would charge the plaintiff five percent rather than three percent above their cost and that the plaintiff was ineligible to receive the wholesale discount of 16 percent.

The defendants' conduct in compelling the plaintiff to pay 16 percent more for Ford crash parts than other customers pay is discriminatory and is part and parcel of the defendants' conspiracy to restrain trade, to maintain the retail price of Ford

crash parts and its attempt to monopolize the market in Ford crash parts. These actions on the part of the defendants are violative of Section 1 and 2 of the Sherman Act and Section 13(a) of the Clayton Act.

Point I

THE DEFENDANTS' ACTIONS IN CONSPIRING AMONG THEMSELVES AND OTHER PERSONS TO RESTRAIN TRADE IN THE MARKET FOR FORD CRASH PARTS IS VIOLATIVE OF SECTION 1 OF THE SHERMAN ACT, 15 U.S.C. 1.

Section 1 of the Sherman Act, 15 U.S.C. 1, in relevant portion, reads as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal ..."

In this case the defendants, Ford Motor Company and Ford Marketing Corporation, have conspired between themselves and with franchised Ford dealers either not to sell to the plaintiff or to sell to it only at such discriminatory prices and highly unfavorable terms so that plaintiff could not compete in the sale of Ford crash parts. An offer to deal only under discrimatory terms and conditions is just as violative of the Sherman Act as a refusal to deal entirely. See Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 70 S.Ct. 705; U.S. v. First National

Pictures, 292 U.S. 44, 51 S.Ct. 45 and Silver v. New York Stock Exchange, 196 F.Supp. 209, aff'd 373 U.S. 341, 83 S.Ct. 246.

This agreement between the defendants and franchised Ford dealers not to sell to the plaintiff at all or only at discriminatory prices is illegal per se and the mere existence of this agreement constitutes a violation of Section 1 of the Sherman Act. The Supreme Court has designated certain classes of combinations as being illegal per se because their mere existence tends to create a monopoly and to stifle competition. One of the actions which has been declared to be illegal per se is the group boycott. See Klor's, supra, and U.S. v. General Motors Corp., 384 U.S. 127, 86 S.Ct. 1321. The defendants' agreement not to deal with the plaintiff or to deal with it only on a discriminatory basis in furtherance of its illegal objective is itself a per se violation of the Sherman Act. Interphoto Corp. v. Minolta Corp., 295 F.Supp. 711, aff'd 417 F.2d 621 (2d Cir. 1969).

The defendants, in this case, have also committed a per se violation of Section 1 of the Sherman Act by restricting the persons to whom its franchised dealers may sell its products after the defendants have parted with title, risk and dominion over the products in question. The defendants in our case sell its crash parts to franchised dealers. Admittedly, once these

goods are turned over to a franchised dealer, the title and dominion over the goods as well as any risks with regard to them is with the dealer and not with the defendants. The defendants, by creating a certain class of people, to wit: the plaintiff, to whom its franchised dealers cannot sell except at highly discriminatory prices, engaged in a per se violation of Section 1 of the Sherman Act.

In U.S. v. Arnold, Schwinn and Co., 388 U.S. 365, 87 S.Ct. 1856 (1967), the Court stated in no uncertain terms:

> "... (W)here a manufacturer sells products to his distributor subject to territorial restrictions upon resale, a per se violation of the Sherman Act results. And, as we have held, the same principle applies to restrictions of outlets with which the distributors may deal and to restraints upon retailers to whom the goods are sold. Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it. White Motor, supra; Dr. Miles, supra. Such restraints are so obviously destructive of competition that their mere existence is enough. If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale. ..." (Emphasis Added)

Here, the defendants are exercising control over the resale of the crash parts in question by refusing to allow its dealers the wholesale incentive (a 16 percent discount) for any parts which a dealer sells to the plaintiff. The practical effect

of the defendants' method of distribution is that eventhough the parts in question are completely owned by its franchised dealers and the franchised dealers have dominion and take the risk with regard to the parts, the defendants can still control the persons to whom the dealer may sell by the means of discriminatory use of the wholesale incentive discount.

The defendants' actions in restricting persons to whom its franchised dealers can sell crash parts after those dealers have obtained title to the parts is a per se violation of Section 1 of the Sherman Act.

The defendants' actions in seeking to prevent the emergence of independent dealers in Ford crash parts has no legitimate purpose and its only purpose is to retain illegal market control and to prevent discounting in the sale of Ford crash parts to body shops. Even prior to Schwinn, supra, if they bng been established that vertical restraints as to territory or customers are per se violations of the Sherman Act, and if they are ancillary to price fixing as they clearly are here. See White Motor Co. v. U.S., 372 U.S. 253, 260, 83 S.Ct. 696 (1963).

The defendants in this case have violated Section 1 of the Sherman Act in two separate ways, each of which is illegal and has caused grave damages to the plaintiff:

a. The defendants have entered into an agreement and combination between themselves and franchised Ford dealers either not to sell to the plaintiff or to sell to it only at highly discriminatory prices, and

b. The defendants have reserved to itself the control over the destiny and the conditions of resale of Ford crash parts at a time when these parts were owned by an independent franchised Ford dealer.

The fact that the defendant, Ford Marketing Corporation, is a wholly owned subsidiary of the defendant, Ford Motor Company, and that some of the franchised Ford dealers with whom the plaintiff does business are likewise owned by the defendant, Ford Motor Company, does not preclude a finding that a conspiracy to restrain trade existed between two or all of them since these defendants have availed themselves of the privilege of doing business through separate corporations, the fact of common ownership cannot save them from any of the obligations that the law imposes on separate entities. See Perma Life Muffler v. International Parts, 392 U.S. 134, 88 S.Ct. 1981 (1968); Credit Bureau Reports, Inc. v. Retail Credit Co., et al., 358 F.Supp. 780 (1971), aff'd 476 F.2d 989, rehearing denied, 478 F.2d 1402.

Point II

THE DEFENDANT'S ACTIONS IN CONSPIRING TO MONOPOLIZE THE TRADE IN FORD CRASH PARTS IS A VIOLATION OF SECTION 2 OF THE SHERMAN ACT, 15 U.S.C. 2.

Section 2 of the Sherman Act, 15 U.S.C.2, makes it illegal for any person to:

> "...monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations ... "

Except for franchised Ford dealers, the plaintiff is one of the few sources and perhaps the only other source from whom independent repair shops were able to obtain Ford crash parts. The defendants by their present actions of requiring the plaintiff to pay 16 percent more for parts than the franchised Ford dealers with whom it competes for business of independent repair shops is putting the plaintiff out of business.

The defendant, Ford Motor Company, is using the monopoly power it has acquired on the manufacturing level since it is the single source of Ford crash parts to eliminate the plaintiff as a competitor at the distributor-jobber level. Such conduct has long been held to violate Section 2 of the Sherman Act. The Supreme Court has long ago condemned a vertically intergrated manufacturer-distributor from using its power on one level to drive out

competition on another level. In Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, Kodak had refused to sell photo equipment to the plaintiff at a wholesale price although the plaintiff was a retail distributor of photo equipment. The Court there found that Kodak was eliminating the plaintiff as a competitor in the retail market and found a violation of Section 2 of the Sherman Act.

Similarly, in Poster Exchange, Inc. v. National Screen Service Corp., 431 F.2d 334 (5th Cir. 1970), the Court found that where the manufacturer and national distributor of motion picture advertising accessories restricted the number of accessories made available to the plaintiff and required the plaintiff who was a wholesale distributor of such products to pay the retail price and finally completely refused to deal with the plaintiff that the defendant was using the monopoly power it had acquired at the manufacturer level to eliminate competition on the distributor-jobber level, and that the defendant had violated Section 2 of the Sherman Act.

The actions taken by the defendants in our case directly parallel those of Kodak and the International Screen Service Corp. which have been held by the Courts to be a violation of Section 2 of the Sherman Act. In our case, Ford is using the monopoly power it has acquired on the manufacturer level to elim-

inate the plaintiff as a competitor with franchised Ford dealers in sales to independent body shops while, at the same time, Ford owns a controlling interest in at least two of the franchised Ford dealers who are the plaintiff's major competitors, that is, Thomas Motors, Inc. and Parkview Lincoln-Mercury, Inc. This is precisely the type of action which the Supreme Court in Times-Picaune Pub. Co. v. U.S., 345 U.S. 594 (1953) called "the essence of illegality ... the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next."

Section 2 of the Sherman Act establishes three separate offenses: a) monopoly; b) attempting to monopolize; and c) combining or conspiring with another person to monopolize any part of the trade or commerce among the several states or with foreign nations.

In our case, not only has Ford attempted to monopolize the wholesale trade in Ford crash parts, but the two named defendants have conspired together with franchised Ford dealers, in some of whom Ford has a controlling interest, to monopolize the wholesale trade in Ford crash parts.

Section 2 prohibits any combination or conspiracy to monopolize whether it be "wholly nascent or abortive on the one hand, or successful on the other," U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150.

For a violation to take place under the conspiracy portion of Section 2, all that is necessary for a violation of Section 2 to be found is whether or not there has been a combination or conspiracy to monopolize. In our case, the actions of the defendants in attempting to destroy the plaintiff as a competitor in the wholesale trade of Ford crash parts leaves no doubt as to the fact that the named defendants and franchised Ford dealers have conspired to monopolize the trade of Ford crash parts to independent body shops and that by doing so they are clearly violating Section 2 of the Sherman Act.

Point III

THE DEFENDANTS BY COMPELLING THE PLAINTIFF TO PAY AN ADDITIONAL 16 PERCENT FOR THE SAME COMMODITY THAN IS PAID BY OTHER PURCHASERS HAS VIOLATED SECTION 2(a) OF THE CLAYTON ACT, 15 U.S.C. 13(a).

There is no real dispute that the plaintiff is required to pay 16 percent more than Ford franchised dealers are for Ford crash parts which it sells to independent repair shops. The defendants charging the plaintiff an additional 16 percent for the same goods of like grade and quality is discriminatory and is violative of Section 2(a) of the Clayton Act, 15 U.S.C. 13(a).

Section 2(a) of the Clayton Act reads as follows:

> "(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

The Act prohibits a discrimination in price between different purchasers of commodities of like grade and quality. It makes no difference whether that discrimination is accomplished by outrightly charging one customer more for the same product than is charged another customer or by granting a discount to one customer. In enforcing the antitrust laws, the Courts must look at an arrangement as it operates in practice rather than the veneer it is given by skillful drafting. See Simpson v. Union Oil Company of California, 377 U.S. 13 (1964). In our case, when all verbiage is pruned, the fact remains that franchised Ford dealers when they resell the very same Ford part to an independent body shop are paying 16 percent less for that part than the plaintiff pays.

The defendants cannot avoid the antitrust laws under the guise of a wholesale incentive and by the skillful drafting of contracts with franchised Ford dealers. There is no justification within the antitrust laws as to why a franchised Ford dealer will receive an additional 16 percent discount when it sells a part to a body shop or a garage and why it will not receive such a discount from the defendants when it sells that very same part to the plaintiff, and the plaintiff must then pay 16 percent more for that very same part.

The Supreme Court has made it clear that price discrimination is not a term of art and that it means no more than so long as different customers are charged different prices for goods of like grade and quality no matter under what guise, it is a violation of Section 2(a) of the Clayton Act. See F.T.C. v. Anheuser-Busch, Inc., 363 U.S. 536. The compelling the plaintiff to pay an additional 16 percent for Ford crash parts is thus a price discrimination directed against the plaintiff and is violative of Section 2(a) of the Clayton Act.

The fact that the plaintiff pays the franchised Ford dealers for the parts which it purchases rather than the defendants directly cannot be used as a shield by the defendants to justify the price discrimination. It has long been accepted that if a seller can control the terms upon which a buyer once removed

may purchase the seller's product from the seller's immediate buyer, the buyer once removed is for all practical purposes dealing directly with the seller. If the seller controls the sale, he is responsible for the discrimination in the sales price. See Purolator Products, Inc. v. F.T.C., 352 F.2d 874 (7th Cir. 1965); American News Company v. F.T.C., 300 F.2d 104 (2d Cir. 1962), cert. denied, 371 U.S. 824 (1962); Monroe Auto Equipment Company v. F.T.C., 342 F.2d 401 (7th Cir. 1965).

The defendants, in our case, have maintained strict control upon the terms regarding the conditions upon which a buyer may purchase Ford crash parts from a franchised Ford dealer. The defendants have issued numerous directives and bulletins regarding the terms and conditions for the resale of Ford crash parts and require each franchised Ford dealer to provide them with a detailed breakdown of the ultimate destination of the Ford crash parts which each dealer has sold. The defendants require each franchised Ford dealer to fill out a detailed form showing the destination of the crash parts each time a dealer requests the wholesale incentive discount from the defendant. In addition, the defendants control and audit the books of all franchised Ford dealers to determine to whom Ford crash parts are actually sold and, in fact, have gone so far as on two occasions to actually audit the books of the plaintiff.

There is thus, in this case, more than sufficient evidence to indicate that the plaintiff was an indirect purchaser of the defendants, and that the defendants by compelling the plaintiff to pay an additional 16 percent for Ford crash parts was discriminating against the plaintiff in price and are in violation of Section 2(a) of the Clayton Act.

Conclusion

The defendants by conspiring not to sell to the plaintiff or to sell to him only at a highly discriminatory price and by maintaining control over the destiny and conditions of resale of Ford crash parts after such parts have been sold to independent franchised Ford dealers are in violation of Section 1 of the Sherman Act.

The defendants' actions in attempting to monopolize the wholesale trade of Ford crash parts and in conspiring to monopolize that trade are in violation of Section 2 of the Sherman Act.

The defendants' compelling the plaintiff to pay 16 percent more for the same Ford crash parts than is paid by other persons are engaged in price discrimination, and their acts are violative of Section 2(a) of the Clayton Act.

That by reason of the defendants' acts as aforesaid which are in violation of the antitrust laws, the plaintiff, pursuant to 15 U.S.C. 15, is entitled to recover three-fold the damages it has sustained by reason of the defendants' actions and likewise is entitled to recover a reasonable attorneys' fees and the costs of this action from the defendants.

Dated: New York, New York
August 21, 1974.

Respectfully submitted,

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BY: _____
A Member of the Firm

Defendants' Trial Memorandum, September 9, 1974

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- -x

FLM COLLISION PARTS, INC.,

Plaintiff,

- against -

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

73 Civ. 713 (TPG)

- -

DEFENDANTS' TRIAL MEMORANDUM

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

FLM COLLISION PARTS, INC.,

Plaintiff,

- against -

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

73 Civ. 713 (TPG)

- x

DEFENDANTS' TRIAL MEMORANDUM

I. THE PARTIES.

Defendant Ford Motor Company ("Ford") is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Dearborn, Michigan. It is primarily engaged in the manufacture and sale of automotive vehicles and related parts and accessories. Defendant Ford Marketing Corporation ("FMC"), a wholly-owned subsidiary of Ford, is also a corporation organized and existing under the laws of the State of Delaware whose principal place of business is in Dearborn, Michigan. FMC was incorporated in 1970 and since July 1970 has been engaged in the sale of Ford, Lincoln and Mercury automobiles manufactured and assembled by Ford and related parts and accessories.

Prior to July 1970 these marketing functions were performed by Ford itself.

Plaintiff FLM Collision Parts, Inc. ("FLM") is a corporation organized and existing under the laws of the State of New York with its principal place of business in Yonkers, New York. Since its incorporation in April 1965, the business of FLM has included the purchasing of Ford, Lincoln and Mercury "crash parts" from franchised Ford and Lincoln-Mercury dealers ("franchised dealers") and the re-selling of those parts to others, including independent garages, service stations and repair or "body" shops engaged in automotive service and repair work. FLM has never purchased crash parts from either defendant and no franchised dealer has been named as a defendant.

II. THE NATURE OF THE ACTION.

Plaintiff has attacked Ford's entire system for the nationwide distribution of its crash parts and from a scatter-gun of charges in its complaint now contends that the distribution system violates Sections 1 and 2 of the Sherman Act and Section 2(a) of the Clayton and Robinson-Patman Acts.

"Crash parts" are used in the repair and replacement of parts on automobiles and include fenders, grills,

hoods, deck lids, door panels, quarter panels, rocker panels and body side mouldings, all custom-designed and manufactured for particular years and models of vehicles. Crash parts are to be distinguished from other automotive parts (such as batteries, spark plugs and filters) which are manufactured by automobile manufacturers and others for use on vehicles of various manufacturers and which are available from various sources.

Ford, Lincoln and Mercury crash parts are manufactured only by Ford, or by other manufacturers using dies owned by Ford who make the parts to Ford's specifications and sell them only to Ford and FMC. Since July 1970 Ford has sold crash parts for Ford, Lincoln and Mercury vehicles (except for export from the United States or directly to the Federal Government) only to FMC. FMC at all times has sold crash parts for Ford, Lincoln and Mercury vehicles (except for export from the United States or directly to the Federal Government) exclusively to franchised Ford and Lincoln-Mercury dealers. The 6,800 franchised dealers in the United States in turn either use these parts in their own body shop repair operations or resell them to others, including FLM. Ford and FMC have adopted a system of

discounts, allowances and credits set forth in Master Price Lists, which apply to their sales of crash parts to their franchised dealers on a uniform national basis.

Plaintiff's complaint stems from its allegation that after November 1, 1972 the prices it paid franchised dealers for crash parts were increased by those dealers. It claims that Ford's system of discounts, allowances and credits to its dealers was responsible for these price increases and that it has a claim therefor under the Sherman Act §§ 1 and 2 and the Clayton Act § 2(a). FLM commenced this action in February, 1973 for both damages and equitable relief requesting that defendants be compelled to change their nationwide distribution system by either selling crash parts directly to FLM or ordering franchised dealers who purchase crash parts to reduce the prices at which they resell parts to FLM.

III. THE ISSUES TO BE TRIED.

This action is to be tried to the Court without a jury. Plaintiff's complaint, no matter how characterized in its trial memorandum, comes down to two points:

-- Ford and FMC sell crash parts only to franchised dealers; and

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-- Ford and FMC give a wholesale incentive discount to franchised dealers, in keeping with a policy adopted in 1968 at the behest of the Federal Trade Commission, only when the dealers resell crash parts to retailers.

The issues raised by the complaint, as now interpreted in plaintiff's trial memorandum, are whether plaintiff has standing to challenge and can demonstrate that either of these two policies as they may affect FLM is (1) an agreement in restraint of trade in Ford, Lincoln and Mercury crash parts in violation of Section 1 of the Sherman Act, (2) an attempt to monopolize the wholesale trade in such crash parts in violation of Section 2 of the Sherman Act, or (3) an unlawful discrimination in price in the sale by FMC of such crash parts in violation of Section 2(a) of the Clayton Act.

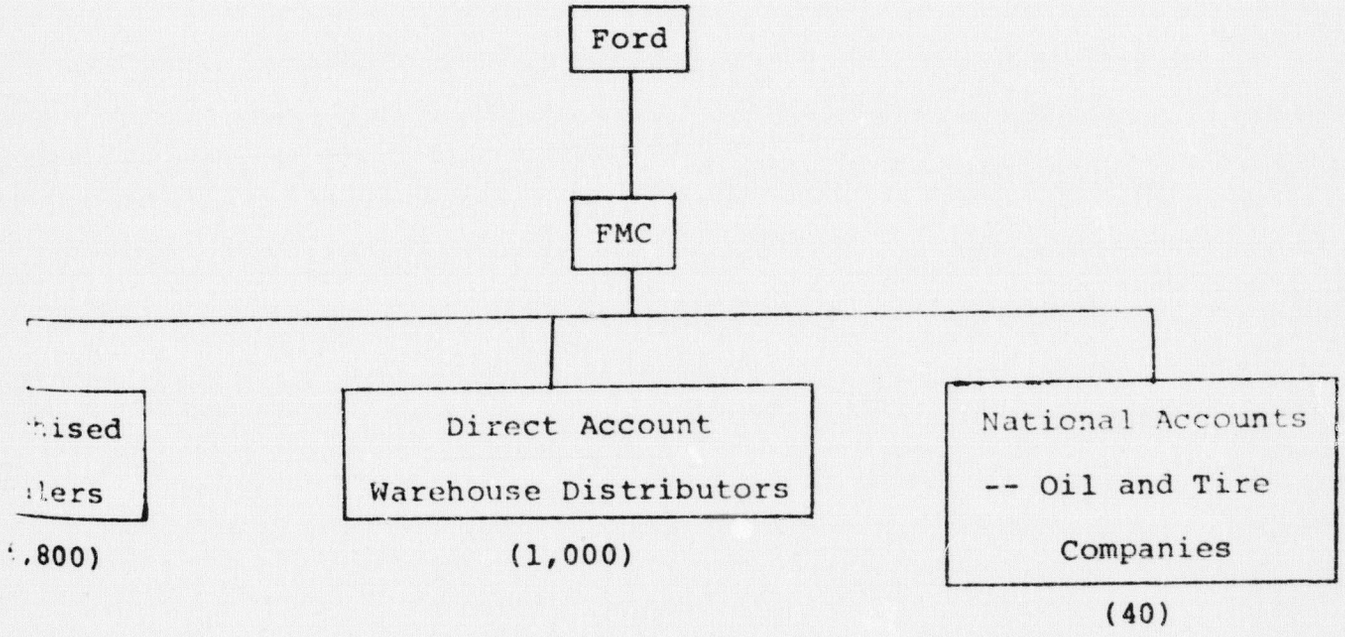
IV. THE EVIDENCE.

A. The Distribution System for Ford's Crash Parts.

Ford and FMC distribute automotive parts, including crash parts, through a nationwide system comprised of three

channels -- (1) franchised dealers, (2) direct account warehouse distributors and (3) national accounts. Crash parts are sold only through the franchised-dealer channel. Other automotive parts such as batteries, spark plugs and filters, which are produced by various manufacturers and which may be used in different makes of automobiles, are sold through all three channels. These initial steps chosen by Ford for distribution of its automotive parts are presented diagramatically in Chart 1.

C H A R T 1



There are approximately 6,800 franchised dealers, 1,000 direct account warehouse distributors and 40 national accounts (primarily oil and tire companies) in this distribution system. The portion of the distribution system shown in Chart 1 is the only portion of the distribution system over which Ford or FMC exercises any control. Once parts have been sold by FMC to a franchised dealer, direct account warehouse distributor or national account, neither Ford nor FMC places or attempts to place any restriction or control as to the territory within which such parts may be sold, the customers to whom they may be sold or the terms or prices of their resale.

Tracing the flow of parts down through the distribution system requires two modifications to Chart 1 to reflect the different functions and levels of distribution at which the purchasers from FMC operate. First, direct and national accounts are considered "distributors" since they sell parts to jobber-wholesalers. Second, franchised dealers play a dual role in the distribution system of parts. Some parts purchased by the dealers are resold by them to body shops, fleets and service stations, and the dealer thus acts as a jobber-wholesaler. Other parts purchased by dealers are used in their own automobile repair and servicing operations and the dealer thus acts as a "retailer" or "dealer". These

aspects of the distribution system are shown diagrammatically on Chart 2.

C H A R T 2

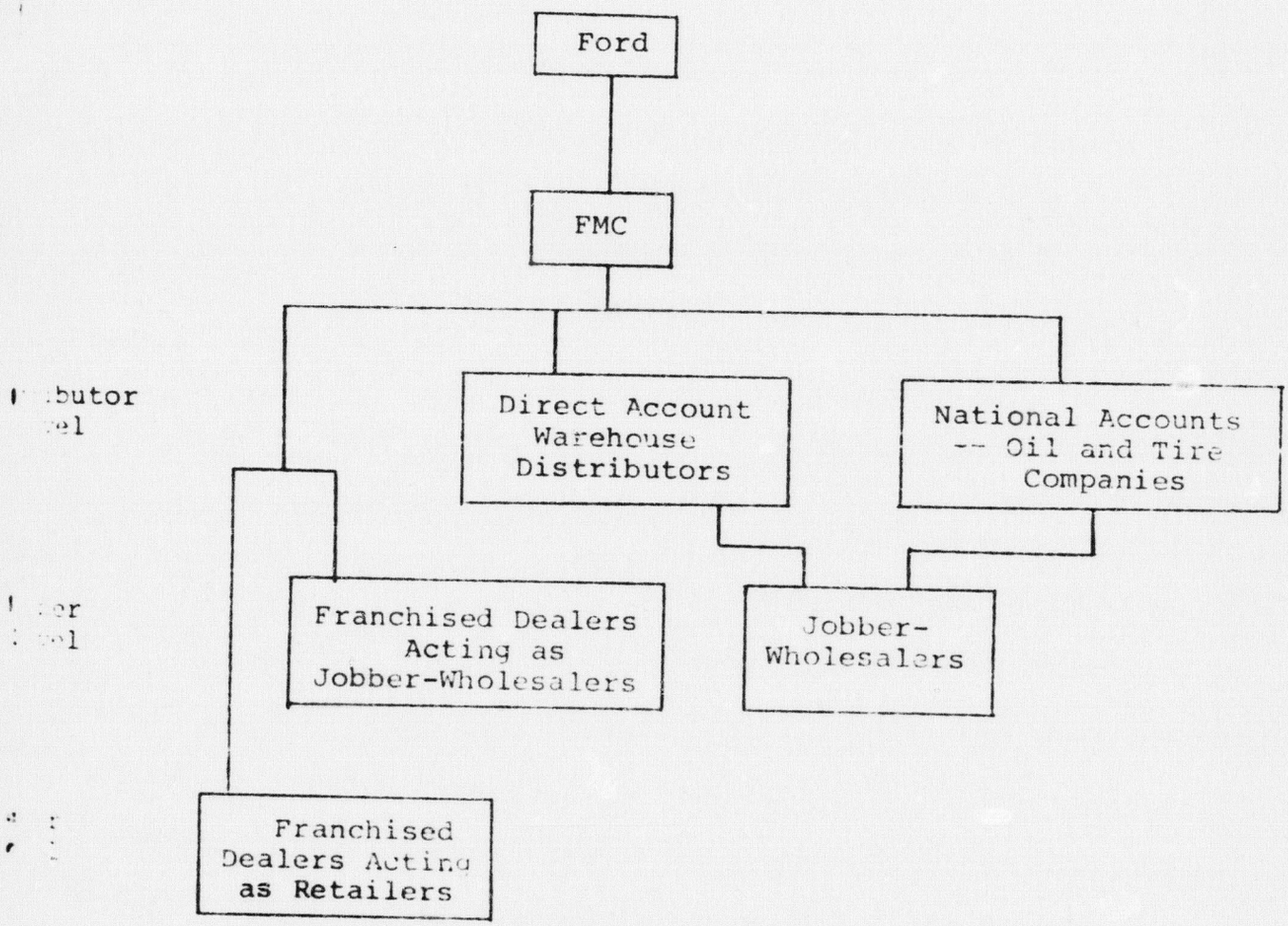
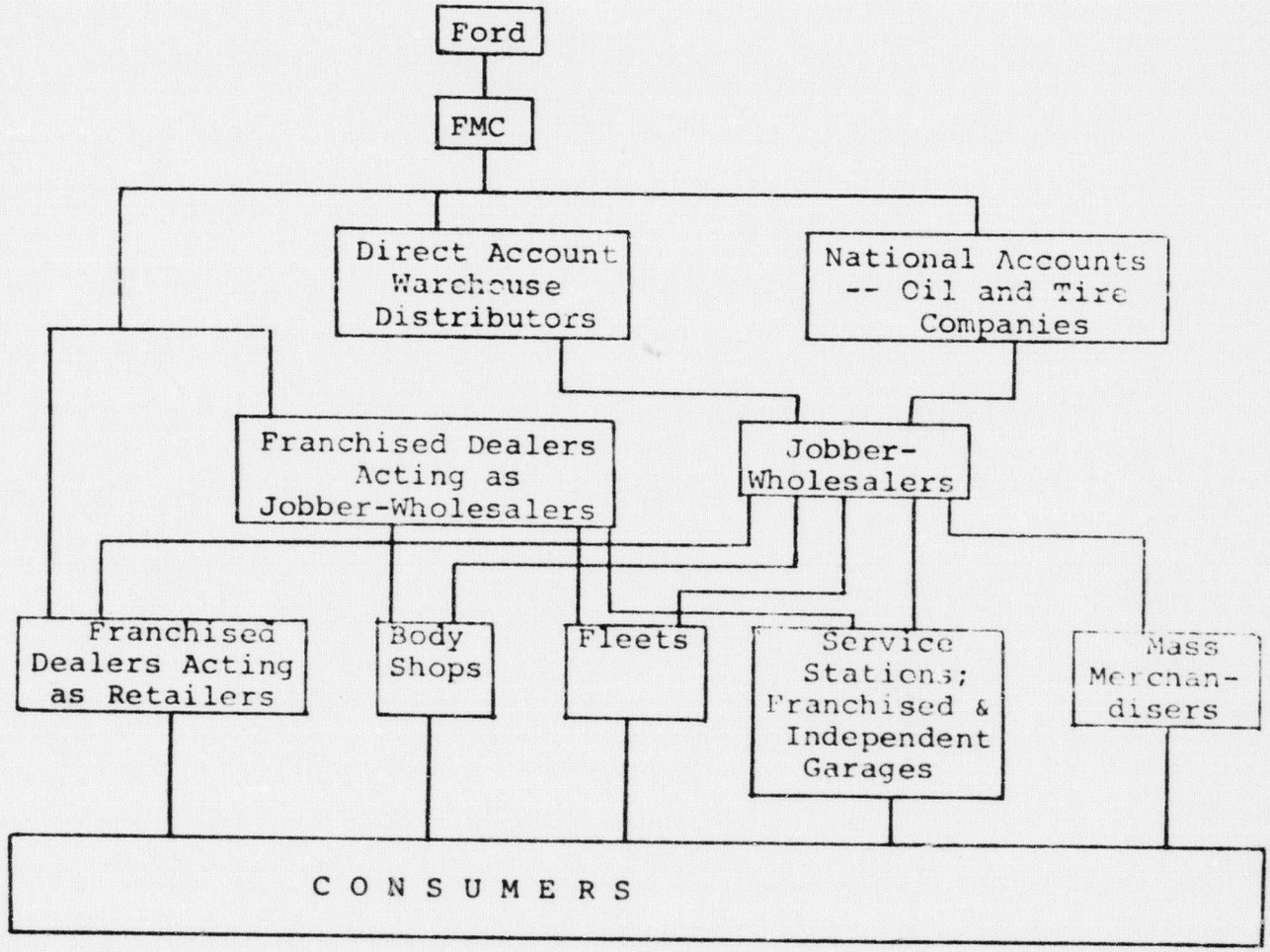


Chart 3 shows Ford's complete system of distribution for automotive parts by adding to Chart 2 sales of parts by franchised dealers and other jobber-wholesalers to body shops, fleets, service stations, garages and mass merchandisers. These entities, as well as franchised dealers, act as re-

tailers and sell the parts to their ultimate consumers -- automobile owners. Crash parts, as noted above, are sold by FMC only to franchised Ford and Lincoln-Mercury dealers, but are ultimately available to the public from franchised dealers, body shops, service stations, garages franchised by oil or tire companies and independent garages.

CHART 3



FMC stocks more than 240,000 different crash parts for all Ford, Lincoln and Mercury automobile models for at least the five most recent model years. Approximately 200,000 different automotive parts, including those rarely required, are available through FMC's National Parts Distribution Center in Michigan; 42,000 different automotive parts, including all those commonly required, are available through FMC's eight Master Parts Distribution Centers (including one in Teterboro, New Jersey for the New York metropolitan area); and approximately 14,000 different automotive parts, only those most frequently required, are available through FMC's twenty Class A Depots throughout the country.

B. FMC's Prices and Terms of Sales.

FMC's sales of automotive parts through its three distribution channels (franchised dealers, direct account warehouse distributors and national accounts) throughout the United States are made on terms and at prices set by FMC on a uniform national basis. These prices and terms are published in the FMC Master Price Lists and Policy and Procedure Manual. The Master Price Lists and the Policy and Procedure Manual set up a pricing system for automotive parts based upon the function performed by the buyer in the distribution

system described above and illustrated in Chart 3 -- as a distributor, jobber-wholesaler or dealer. The Master Price Lists show the prices charged by FMC to buyers at various functional levels in the distribution system. The price which FMC charges franchised dealers acting as retailers for a particular part as set forth in the Master Price Lists is used as a benchmark for the pricing system and other prices are computed from it.

Franchised dealers are eligible to receive certain discounts, allowances and credits from FMC on their purchases of crash parts as well as on their purchases of other parts. These discounts, allowances and credits are set forth in the Policy and Procedure Manual. They are:

1. The Stock Order Discount. Each of the approximately 14,000 parts stocked by Class A depots is listed on a printed stock order "pad" of order forms supplied to franchised dealers. Each dealer is entitled to order on this form from its Class A depot on a specified day of the week any parts stocked by FMC and receives a 5% discount on such purchases because the regularity of orders enables FMC's Class A depots to operate more efficiently and economically.*

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* Stock order discounts on certain parts are also available to direct account warehouse distributors and national accounts.

2. The Wholesale Incentive Allowance. This allowance is examined in detail the following section of this memorandum.

3. The Parts Obsolescence Protection Program ("POPP") Credit. Franchised dealers may return obsolescent parts in their inventories to FMC and receive full credit for their purchase price. POPP credits granted for any given period are limited to 5% of the dollar amount of the franchised dealer's purchases during that period.

4. The Surplus Inventory Reduction Program ("SIRP") Credit. Franchised dealers may return surplus parts in their inventories to FMC and receive credit for a portion of their purchase price. SIRP credits for any given period are limited to 3% of the dollar amount of the franchised dealer's purchases during that period.

C. The Origin and Availability of the Wholesale Incentive Allowance on FMC's Sales of Crash Parts to Franchised Dealers.

While previously available on purchases of other certified automotive parts, the wholesale incentive allowance for crash parts was initially established by Ford on November 1, 1975 at the behest of the Federal Trade Commission. Its objective with respect to crash parts is to enable body shops,

service stations and independent garages to obtain crash parts at prices comparable to those paid by franchised dealers for crash parts used in the dealers' own automobile repair operations. To accomplish this objective FMC grants to franchised dealers a wholesale incentive allowance when the franchised dealers act as jobber-wholesalers of crash parts. This allowance, currently approximately 25% of the price shown in the Master Price Lists for franchised dealers acting as retailers for the same part, is credited against the franchised dealers' debts to FMC for parts purchased by the franchised dealers.

At the time the wholesale incentive allowance was established for crash parts it was being granted generally, pursuant to the Policy and Procedure Manual, for all resales of parts eligible for this allowance by franchised dealers. However, in keeping with its general purpose and the objective of the Federal Trade Commission in having it available on crash parts, it was provided in the Policy and Procedure Manual that the wholesale incentive allowance would not be granted for parts used in the franchised dealers' own repair and service operations or for parts sold to another franchised dealer for similar use in its repair and service operations (i.e., "sales to retail customers").

In due course, however, it became apparent to Ford and FMC that the statement of the policy on the wholesale incentive allowance in the Policy and Procedure Manual permitted franchised

dealers to claim the allowance for resales in which the dealers in fact did not perform this jobber-wholesaler function of moving the goods to the retailer level. To assure that the allowance was given only when a franchised dealer acted as a jobber-wholesaler and to prevent franchised dealers from abusing the program by selling parts to each other through middlemen, the Policy and Procedure Manual was amended in accordance with a letter notice of June 23, 1971, effective July 1, 1971, to state that the wholesale incentive allowance for resales by franchised dealers was limited to those situations in which the dealers actually acted as jobber-wholesalers and sold directly to retailers (other than franchised dealers) engaged in automotive service or repair work.

D. Sales of Crash Parts by Franchised Dealers.

The discounts, allowances and credits, including the wholesale incentive allowance, with respect to sales by FMC of crash parts are credited or paid directly to the franchised dealers to whom such parts are sold by FMC. Franchised dealers individually decide the prices at which and the terms on which they resell crash parts to their customers. Neither Ford nor FMC controls that decision. Franchised dealers may or may not elect to reflect, in whole or in part, in their prices and terms of sale to any particular customer any discount, allowance or credit which they receive from FMC with respect

to their purchases of crash parts. Whether a franchised dealer reflects in its prices or terms of sale any portion of a discount, allowance or credit received by it from FMC does not in any way affect its receipt by the franchised dealer.

E. The History of FLM's Business in Crash Parts.

FLM alleges that since it was incorporated in April 1965 its business has included purchasing Ford, Lincoln and Mercury crash parts from franchised dealers and reselling them, primarily to independent body shops, garages and service stations. FLM thus functions merely as an intermediary between franchised dealers and retail customers. It does not occupy any separate functional level in the distribution system for Ford's crash parts, but is only an expediter of deliveries from franchised dealers to retail customers. It is not merely a delivery service for the dealers from whom it buys parts, however, since it actually purchases the parts from the dealers and resells them to retail customers. It also maintains a small inventory of crash parts (valued in its financial statements on September 30, 1973 at $70,321) at its office in Yonkers.

FLM alleges that it has from time to time purchased crash parts from four Ford and Lincoln-Mercury dealers: Central Lincoln-Mercury Corp. ("Central") (dealership sold to Atlas Lincoln-Mercury, Inc. ["Atlas"] in July 1972) of Brooklyn, Thomas Motors, Inc. ("Thomas") of Yonkers, Parkview Lincoln-Mercury, Inc. ("Parkview") of Yonkers and Pleasantville Ford, Inc. ("Pleasantville") of Pleasantville.

FLM claims that it purchased crash parts from Central, and subsequently Atlas, from April 1965 until November 1, 1972. It also claims that it purchased crash parts from Thomas from November 1, 1972 until June 4, 1973. FLM allegedly also has purchased crash parts from Parkview beginning on November 1, 1972 and from Pleasantville on unspecified dates. Whatever its source or sources of supply, FLM's dollar volume of sales of crash parts has increased steadily over the years. Its gross sales for each of its fiscal years (ending September 30th) as reported in its own financial statements have been as follows:

Year	Gross Sales
1965 (six months)	$ 81,670
1966	245,739
1967	337,297
1968	389,987
1969	483,015
1970	620,769
1971	654,382
1972	736,937
1973	798,947

The prices FLM pays various franchised dealers for the parts it purchases, the terms on which it buys parts and the choice of dealers with which it does business are all matters for negotiation between FLM and the dealers, and neither Ford nor FMC has played or sought to play any role in such matters.

Despite FLM's allegations that Ford and FMC have "conspired" with unspecified franchised dealers to deprive FLM of a source of supply of crash parts and to force those dealers to raise the prices they charge FLM for crash parts,

the evidence will not bear out either charge. FLM has asserted that Ford or FMC instructed Atlas and Thomas to stop selling crash parts to FLM on October 31, 1972 and June 4, 1973 respectively. However, in the affidavits before the Court on the preliminary injunction the operators of both dealerships and the employee of FMC who allegedly issued these instructions have denied these charges, and the record shows that Atlas and Thomas made their decisions to stop selling crash parts to FLM for their own independent business reasons. Franchised dealers are independent businessmen, operating with their own capital* for their own profit.

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* Some dealers, like Parkview (until May 31, 1973) and Thomas, are part of FMC's "Dealer Development Program" for individuals qualified in all other respects to become dealers who lack the necessary capital. An approved applicant invests 20% of the necessary capital and FMC invests the rest. The dealer is incorporated, the operator receives all the (non-voting) common stock and FMC receives all the (voting) preferred stock. The operator is required to use a minimum amount of each year's operating profits to buy out FMC's investment in the dealer -- a process which typically takes approximately 6 years. Preferred stock purchased by the operator is converted into common stock and when the preferred stock has been retired the voting rights pass to the common stock. This process was completed at Parkview on May 31, 1973.

The operator is elected to the dealer's board of directors and serves as president of the dealer, participating in the adoption of financial and operating policies with the other directors who are employees of FMC's Dealer Development Department. The president, however, has full authority to administer the affairs of the dealer and to conduct its day-to-day operations in accordance with the broad overall policies adopted by the board of directors.

The decisions by Dealer Development dealers, like Thomas and Parkview, whether or not to sell parts to FLM or any other purchaser and the prices and terms of such sales are made by their respective operators and not by Ford or FMC.

From November 1, 1968 until July 1, 1971 franchised dealers which sold crash parts to FLM were not foreclosed under the language of the Policy and Procedure Manual with respect to "ineligible sales" from claiming wholesale incentive allowance credits from FMC on such sales. On July 1, 1971, for reasons stated above, the statement of the Wholesale Incentive Program in the Manual was clarified with respect to "ineligible sales" to specify as ineligible: "Sales to any customers NOT engaged in automotive service or repair work except export agencies. . . ." FLM does not dispute that it clearly falls within this ineligible category.

Despite this clarification in the statement of the Wholesale Incentive Program, both Central and then Atlas continued to claim from FMC wholesale incentive allowance credits for sales to FLM until November 1, 1972, some 16 months after the policy change. The responsible officials of Central and Atlas apparently did not realize that their sales of crash parts to FLM were now clearly ineligible for the wholesale incentive allowance. A similar oversight on the part of the responsible FMC officials led FMC to continue to pay wholesale incentive allowance credits claimed by Central and Atlas with respect to such sales until November 1, 1972. When this error was discovered by the responsible personnel at FMC, the payment

of such credits was promptly terminated. However, in the circumstances of the transfer of the dealership to Atlas, FMC did not recover the credits for the pre-November 1972 period due to the fact that Atlas appeared to have acted in good faith and that FMC had failed to act earlier to stop this improper claiming of the wholesale incentive allowance. Since November 1, 1972 no franchised dealer, to FMC's knowledge, has received credits from FMC for wholesale incentive allowance for resales to FLM.

Plaintiff has claimed that it is a so-called "indirect purchaser" of crash parts from FMC for the purposes of its claim under Section 2(a) of the Clayton Act. It attempts to buttress this claim by noting that it picks up parts which it has purchased from franchised dealers from the Master Parts Distribution Center in Teterboro, New Jersey.

Customers of a franchised dealer are permitted by FMC to pick up parts which the customers are purchasing from the franchised dealer directly from the Teterboro Master Parts Distribution Center if they have obtained written authority to do so from the franchised dealer. However, FMC bills the franchised dealer for any parts thus delivered to the dealer's customer and the dealer in turn obtains payment from its customer. The dealer is the only party liable to

FMC for the purchase price of the parts and bears the entire risk of non-payment by its customer.

Plaintiff in claiming a connection with defendants also relies on the fact that Ford or FMC personnel on two occasions made examinations, to which FLM voluntarily submitted, of FLM's records of its purchases from Central. In 1969 an examination was conducted to verify the accuracy of the claims for wholesale incentive allowance credits submitted by Central and to confirm that FLM was not acting as an intermediary between franchised dealers through whom dealers could buy parts for their own body shops at reduced prices. In 1970 an examination of Central was conducted for the purpose of determining the relationship of FLM and Central and whether that relationship met the requirements for the issuance of a second parts and accessories code to a franchised dealer.

F. FLM's Institution of this Action.

FLM filed its complaint on February 15, 1973, three and one-half months after it claims that its sellers raised their prices to it on crash parts. Three months after commencing this action FLM filed a motion for a preliminary injunction which it subsequently withdrew as incomplete. On August 24, 1973 FLM filed another motion for a preliminary injunction which was withdrawn by plaintiff on March 11, 1974 when the Court proposed that the action

be tried promptly and set the case down for trial on April 1, 1974. This trial date was thereafter successively postponed to June 17, August 28 and September 23, 1974 at plaintiff's request.

V. THE APPLICABLE LAW.

Under Section 4 of the Clayton Act plaintiff can recover only if it can demonstrate that it has been directly injured in its business by defendants' violations of the antitrust laws. Before FLM could make any such demonstration it is confronted with the following insurmountable obstacles:

A. Ford and FMC are free under the antitrust laws to choose to whom they will sell crash parts;

B. While FLM seeks to compel Ford and FMC to add a tier to their distribution system for crash parts, Ford and FMC have no obligation under the antitrust laws to alter the terms and conditions of their sale of crash parts to create a place for FLM in that distribution system;

C. FLM is not a customer of Ford or FMC and it fails to state a cognizable claim against them for discrimination under the antitrust laws;

D. In their refusal to sell crash parts directly to FLM and their refusal to allow wholesale incentive allowance credits for sales by franchised dealers to FLM there is no evidence of any agreement or conspiracy in restraint of trade by Ford or FMC; and

E. There is no evidence of any attempt by Ford or FMC to monopolize the subsequent wholesale trade in crash parts after they have sold and delivered such parts.

For these reasons we submit that the complaint must be dismissed and judgment entered for the defendants.

A. Ford and FMC are free to choose their customers and to decide that they will sell crash parts only to franchised dealers.

Defendants have customarily sold crash parts only to franchised Ford and Lincoln-Mercury dealers. This freedom to choose customers is expressly sanctioned by the antitrust laws. It has been sustained by the courts in their interpretation of the Sherman Act for more than 50 years. Bruce's

Juices, Inc. v. American Can Co. , 330 U.S. 743 (1947); U.S. v. Colgate & Co., 250 U.S. 300 (1919); Loran Specialty Mfg. Co. v. Clark Mfg. Co., 360 F.2d 913 (7th Cir.), cert. denied, 385 U.S. 956 (1966); Chicago Sugar Co. v. American Sugar Refining Co., 176 F.2d 1 (7th Cir. 1949).

The Robinson-Patman Act amendment to the Clayton Act also protects a supplier's freedom to choose its customers. Section 2(a) itself provides that "nothing herein shall prevent persons engaged in selling goods, or merchandise, in commerce from selecting their own customers in bona fide transactions and not in restraint of trade" and the Courts have uniformly endorsed this principle. In Atlanta Trading Corp. v. FTC , 258 F.2d 365 (2d Cir. 1958) the Court said:

> "Nothing in the Robinson-Patman Act imposes upon a supplier an affirmative duty to sell to all potential customers. . . . All that the Act requires is that a seller give fair and equal treatment to all those to whom he elects to sell products of like grade and quantity." 258 F.2d at 372-373.

Accord, Chicago Seating Co. v. S. Karpen & Bros., 177 F.2d 863 (7th Cir. 1949); Shaw's, Inc. v. Wilson-Jones Co., 105 F.2d 331 (3d Cir. 1939); Monroe Company of Quincy v. American Standard Inc., 368 F.Supp. 603 (D. Mass. 1973); New Amsterdam Cheese Corp.

v. Kraftco Corp., 363 F.Supp. 735 (S.D.N.Y. 1973).

Plaintiff, however, seeks to compel defendants to sell crash parts to it, regardless of the entirely different character of its business from that of franchised Ford and Lincoln-Mercury dealers.

Colgate and subsequent Supreme Court cases on the issue clearly demonstrate that "In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." 300 U.S. at 307. Such is the case here.

The convenient and effective distribution of crash parts for their vehicles is of substantial importance to vehicle manufacturers. Ford's policy of selling crash parts exclusively to its own franchised dealers dates from the incorporation of the Ford Motor Company in 1919. The marketability of new Ford, Lincoln and Mercury automobiles would be severely impaired if consumers could not be assured of the ready availability of repair and replacement parts. Consequently, the decision to distribute these parts solely through defendants' franchised dealers serves a business purpose with

which Ford is legitimately concerned. FLM, as a volunteer, has no standing to insist that Ford and FMC sell to it and alter the manufacturer's system of distributing its products to suit plaintiff's desires (see pp. 30-35, infra).

Once crash parts are sold to the franchised dealers, they are, of course, readily available to the general public, including FLM and any other purchaser to whom a franchised dealer may wish, in its discretion, to sell.

A review of the leading Supreme Court cases clearly demonstrates that a refusal to sell to a plaintiff is not an actionable wrong under the antitrust laws unless the refusal is a means to an independently unlawful end. When a refusal to sell, actual or threatened, is used to coerce a purchaser to follow certain pricing policies the courts have not hesitated to condemn such refusals -- not as violations of the antitrust laws in and of themselves, but as forbidden means because the end of fixing prices is illegal. Albrecht v. Herald Co., 390 U.S. 145 (1968); U.S. v. Parke, Davis & Co., 362 U.S. 29 (1967); U.S. v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944); FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922); Frey & Son, Inc. v. Cudahy Packing Co., 256 U.S. 208 (1921); U.S. v. Schrader's Son, Inc., 252 U.S. 85 (1920). A second

indispensable requirement to any actionable wrong articulated by the Supreme Court in these leading cases is that the refusal to sell be effectuated by some contract or combination with others; mere unilateral action will not suffice.

There is no suggestion that Ford in connection with its long-standing policy has in any way conditioned the franchise of dealers on their agreement to participate in conduct which would independently violate the antitrust laws or that Ford has contracted, combined or conspired with others in the course of refusing to sell to entities other than franchised dealers.

In Albrecht v. Herald Co., supra, the Supreme Court found that defendant had combined with two of plaintiff's competitors by encouraging and assisting them in taking over sales to plaintiff's customers after plaintiff refused to adhere to defendant's pricing policies. Defendant offered to continue to sell to plaintiff if plaintiff would carry out defendant's policy of setting a maximum resale price, a per se violation of Section 1 of the Sherman Act. 390 U.S. at 151. To accomplish such an end by refusing to sell to plaintiff was therefore also held illegal. The Court also noted that "[defendant's] conduct cannot be deemed wholly unilateral and beyond the reach of § 1 of the Sherman Act." 390 U.S. at 149.

Albrecht followed the reasoning of U.S. v. Parke, Davis & Co., supra. Parke, Davis began by reviewing the other four leading cases following Colgate* and, in each case, found both that the refusal to deal was used as a means to an illegal end and that the seller acted in concert with others. 362 U.S. at 36-47. As to Parke, Davis' conduct, the Court commented:

> "The program upon which Parke Davis embarked to promote general compliance with its suggested resale prices plainly exceeded the limitations of the Colgate doctrine and under Beech-Nut and Bausch & Lomb effected arrangements which violated the Sherman Act. Parke Davis did not content itself with announcing its policy regarding retail prices and following this with a simple refusal to have business relations with any retailers who disregarded that policy. Instead Parke Davis used the refusal to deal with the wholesalers in order to elicit their willingness to deny Parke Davis products to retailers and thereby help gain the retailers' adherence to its suggested minimum retail prices. The retailers who disregarded the price policy were promptly cut off when Parke Davis supplied the wholesalers with their names. The large retailer who said he would 'abide' by the price policy . . . was not cut off. In thus involving the wholesalers to stop the flow of Parke Davis products to the retailers, thereby inducing retailers' adherence to its suggested retail prices, Parke Davis created a combination with the retailers and the wholesalers to maintain retail prices and violated the Sherman

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* U.S. v. Bausch & Lomb Optical Co., supra; FTC v. Beech-Nut Packing Co., supra; Frey & Son, Inc. v. Cudahy Packing Co., supra; and U.S. v. Schrader's Son, Inc., supra.

> Act. Although Parke Davis' originally announced wholesalers' policy would not under Colgate have violated the Sherman Act if its action thereunder was the simple refusal without more to deal with wholesalers who did not observe the wholesalers' Net Price Selling Schedule, that entire policy was tainted . . . when Parke Davis used it as the vehicle to gain the wholesalers' participation in the program to effectuate the retailers' adherence to the suggested retail price." 362 U.S. at 45-47 (footnote omitted).

Plaintiff's statement that "an offer to deal only under discriminatory terms and conditions is just as violative of the Sherman Act as a refusal to deal entirely" (Pl. Tr. Mem. 5) misses the point of this case. Refusals to deal and discriminatory offers to deal are condemned alike by Section 1 of the Sherman Act, but only if there is concerted action by two or more entities. U.S. v. Colgate & Co., supra. All of plaintiff's citations in support of this proposition* involved "group boycotts" or "concerted refusals to deal" which are not present in this action. Ford and FMC may properly under Colgate and its progeny, refuse to deal with FLM. Neither Ford nor FMC controls franchised dealers' sales to FLM or the terms and prices of those sales, which are a matter for negotiation between FLM and its suppliers. Since

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* Silver v. New York Stock Exchange, 373 U.S. 341 (1963); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) and U.S. v. First National Pictures, Inc., 282 U.S. 44 (1930).

whatever arrangements FLM makes with a franchised dealer will not affect in any way that dealer's relationship with Ford or FMC, plaintiff's argument is irrelevant, as is its additional citation of U.S. v. General Motors Corp., 384 U.S. 127 (1966) for the proposition (not disputed by defendants) that group boycotts are illegal per se (Pl. Tr. Mem. 6).

Plaintiff's citation of Interphoto Corp. v. Minolta Corp., 295 F. Supp. 711 (S.D.N.Y.), aff'd, 417 F.2d 621 (2d Cir. 1969) and U.S. v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) is equally inapposite, since Interphoto concerned territorial and customer restrictions on resales and attempted price-fixing and the Schwinn case concerned territorial and customer restrictions. Both Interphoto and Schwinn involved concerted action between the manufacturers and their independent distributors to plaintiffs' detriment. No such concerted action is present here.

The facts of the cases stand in stark contrast to Ford's policies. Ford will not sell crash parts on any terms to plaintiff -- or to anyone else who is not a franchised dealer. It has never offered to do so. Its refusal is not contingent on a would-be purchaser's agreement to follow any policies with respect to the resale of the parts. Neither

Ford nor FMC has combined or acted in concert with any other entity in refusing to sell crash parts to anyone other than a franchised dealer. This decision has been unilateral, unconditional, entirely uniform and national in its application.

B. Ford and FMC should not be compelled to change their distribution system for crash parts to create a place for FLM.

The long-established system for the distribution of Ford, Lincoln and Mercury crash parts incorporates two major features challenged by plaintiff in this case: (1) FMC sells crash parts only to franchised dealers, and (2) FMC does not grant a wholesale incentive allowance to franchised dealers on their sales of crash parts to middlemen such as FLM. Plaintiff asks the Court to restructure this distribution system either (1) by ordering FMC to sell crash parts directly to middlemen or (2) by ordering Ford and FMC to grant a wholesale incentive allowance to franchised dealers on their sales to middlemen.

Such interferences in a manufacturer's system of distributing its products have been uniformly rejected by the courts, and a middleman such as FLM which voluntarily intrudes

itself into such a system has been held to have no vested right to the protection of the position it has sought to appropriate for itself. Green Bay Packaging, Inc. v. Hoganson & Associates, Inc., 362 F.Supp. 78, 82 (N.D. Ill. 1973). In B&B Oil & Chemical Co. v. Franklin Oil Co., 293 F.Supp. 1313 (E.D. Mich. 1968) the District Court stated:

> "The opinions have been unanimous, insofar as we have been able to determine, in holding that a manufacturer's changes in his distribution system, vertical realignments, eliminations, or transfers, do not offend the anti-trust acts.
>
> . . . .
>
> "We find no warrant in the statutes for extending the anti-trust prohibition to cover this situation. Such a holding would open up a new chapter in anti-trust law, and without statutory warrant, subjecting the entire field of a manufacturer's internal plan of distribution to the approval of the courts. Moreover, it proves too much. Once we remove the flexibility from manufacturers in their vertical distributorships we freeze to some degree the presently existing structures, with a resultant definite, not fanciful, restraint on the freedom of competition.
>
> "This case may be very shortly summarized. Once the borrowed phrases from legitimate anti-trust actions are pierced, it boils down, by plaintiff's own statements, to simply the elimination by the manufacturer of an unwanted distributor. There is thus no unreasonable restraint of 'competition' in the anti-trust sense nor is there even a hint of monopoly." 293 F.Supp. at 1317, 1319.

Accord, Robinson v. Stanley Home Products, Inc., 272 F.2d 601 (1st Cir. 1959); Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953); Feddersen Motors v. Ward, 180 F.2d 519 (10th Cir. 1950); Shotkin v. General Electric Co., 171 F.2d 236 (10th Cir. 1948).

An order compelling defendants to deal directly with FLM would have no foundation in law and the Court would not be warranted in issuing one. (See pp. 22-30, supra). Plaintiff's alternative request for relief, which is equally lacking in legal justification, would involve the Court in the restructuring of Ford's nationwide system for distributing crash parts. To require FMC to grant a wholesale incentive allowance to franchised dealers for resales to FLM would mean compelling the payment of an allowance for a function not performed by such dealers. The wholesale function is selling to retailers; this function such dealers do not perform when they sell to a jobber-wholesaler. Compelling the allowance in such a situation is tantamount to making a "distributor" (one whose function is to sell to jobber-wholesalers) of such dealers, a role not occupied by franchised dealers in the Ford and FMC distribution system.

In U.S. v. Paramount Pictures, Inc., 334 U.S. 131 (1948) the Supreme Court reversed the District Court's decree ordering defendants to select the exhibitors of their motion

pictures by competitive bidding. The Court held that this remedy involved the judiciary too deeply in the daily operation of defendants' business and commented that the decree would require "as close a supervision as a continuous receivership". 334 U.S. at 163. Accord, U.S. v. Bausch & Lomb Optical Co., supra, at 728-729.

To restructure Ford's distribution system at the behest of a stranger to that system, such as FLM, would be absurd. Even in cases in which the plaintiffs were or had been an integral part of the manufacturer's distribution system the courts have consistently refused to tamper with that distribution system, even at the request of those who had dealt directly with the manufacturer. FLM has never occupied a comparable position in the distribution of Ford's crash parts.

In Industrial Building Materials, Inc. v. Interchemical Corp., 278 F.Supp. 938 (C.D. Cal. 1967), plaintiff alleged that defendant had:

> "ruthlessly exercised [its monopoly power over the manufacture, distribution and sale of its own products] to destroy plaintiff's business by creating a new distributor to compete with plaintiff, by by-passing plaintiff and dealing on a direct basis with some of plaintiff's better customers, and eventually by hiring plaintiff's star salesman and stealing the bulk of plaintiff's business, all the while utilizing 'discriminatory' pricing policies in aid of such destruction and, all in violation of plaintiff's contractual right to be the exclusive distributor of [defendant's] products in its territory as long as it did a good job." 278 F.Supp. at 958.

The Court, however, granted summary judgment for defendants and held:

> "But the exercise by the [defendant] of its lawful monopoly power in the manner charged does not make its lawful monopoly over its own products unlawful.
>
> "[Defendant] at any time could have terminated plaintiff's distributorship of [defendant's] products, appointed a new distributor and refused to deal further with plaintiff, without making its natural monopoly of its own products illegal or otherwise violating the antitrust laws . . . as far as the antitrust laws are concerned, the [defendant] was free at any time to alter its distribution system in any manner satisfactory to it without thereby rendering its natural lawful monopoly over its own products unlawful." 278 F.Supp at 958-959.

Accord, Walker Distributing Co. v. Lucky Lager Brewing Co., 323 F.2d 1 (9th Cir. 1963); Ace Beer Distributors, Inc. v. Kohn, Inc., 318 F.2d 283 (6th Cir.), cert. denied, 375 U.S. 922 (1963); Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418 (D.C. Cir.), cert. denied, 355 U.S. 822 (1957); Schwing Motor Co. v. Hudson Sales Corp., 138 F.Supp. 899 (D. Md.), aff'd per curiam, 239 F.2d 176 (4th Cir. 1956), cert. denied, 355 U.S. 823 (1957).

The commodity involved in the present case is Ford's own product. Plaintiff is merely an unsolicited participant which has intruded into the distribution system of Ford, Lincoln and Mercury crash parts. FLM, however, has never made any purchases of crash parts from Ford or FMC and never

entered into any contracts with Ford or FMC as had the plaintiffs in the cases cited above. Nor has FLM been cut off from its supply of crash parts; it continues to the present day to buy an ever-increasing dollar volume of crash parts from franchised dealers. Yet plaintiff now seeks radically to reorder defendants' system of distributing their own products by having this Court forcibly inject it into a level of defendants' own distribution system -- where it is neither needed nor desired -- over defendants' vigorous protests, or, even more radical, by having the Court tinker with defendants' system of discounts, allowances and credits. Such relief is not available to plaintiff under the antitrust laws or any other legal principle.

The evidence will show that once crash parts are sold to franchised dealers, those dealers are free to resell such parts to anyone, on any terms and at any price they choose. FLM remains able to buy such parts from such dealers. It has no right to dictate the terms on which Ford and FMC sell crash parts to their franchised dealers. Moreover, it has no right to ask the Court to create a new and superfluous level in defendants' distribution system between the wholesale level and the retail level and to compel the insertion there of FLM.

C. FLM is not a customer of Ford or FMC and therefore has no claim for relief based upon their alleged discrimination in the price charged for crash parts.

There is a serious defect in plaintiff's theory of

this case: it falsely alleges that "'FLM' purchases its crash parts from . . . defendants." (Compl. ¶ 13) (emphasis added) and that Ford has discriminated in price between franchised dealers on the one hand and FLM on the other. In fact, neither defendant has ever sold crash parts to FLM. Ford sells crash parts only to FMC and FMC sells crash parts only to franchised dealers. Plaintiff has purchased its parts only from such dealers.

FLM, as a customer of a franchised dealer, is permitted to pick up parts it purchases from the franchised dealer directly from FMC's Master Parts Distribution Center in Teterboro, New Jersey. However, FMC bills the franchised dealer for any parts thus delivered to FLM and the dealer in turn obtains payment from FLM. For all such sales by FMC of crash parts it bills the franchised dealer for the purchase price of the parts and the dealer alone is liable to FMC therefor. Any risk of non-payment by FLM is borne by the dealer. In no sense can these transactions be considered "sales" from FMC to FLM.

It is settled that a claim for relief under Section 2(a) of the Clayton Act may be maintained only by a plaintiff to whom defendant has made a sale. "The decisions of many cases have crystallized the rule that an individual can have no cause of action under Section 2(a) . . . unless he is an actual purchaser from the person charged with the discrimination."

Klein v. Lionel Corp., 237 F.2d 13, 14-15 (3d Cir. 1956) (footnote omitted); accord, Jones v. Metzger Dairies, Inc., 334 F.2d 919 (5th Cir. 1964); Naifeh v. Ronson Art Metal Works, Inc., 218 F.2d 202, 206 (10th Cir. 1954); Chicago Seating Co. v. S. Karpen & Bros., supra; Shaw's Inc. v. Wilson-Jones Co., supra. "[O]ne cannot have a cause of action for a violation under [§ 2(a)] unless one is an actual purchaser from the person charged with discrimination." Baim & Blank, Inc. v. Philco Corp., 148 F.Supp. 541, 543 (E.D.N.Y. 1957).

Since neither defendant has ever sold crash parts to plaintiff, the complaint is fatally defective and fails to state any cognizable claim for discrimination in selling price.

Under special circumstances some courts have permitted persons who had not made actual purchases from a defendant nonetheless to maintain an action under Section 2(a) of the Clayton Act under the so-called "indirect purchaser doctrine" which was first atriculated by the Federal Trade Commission in Kraft-Phenix Cheese Corp., 25 F.T.C. 537 (1937). In Kraft-Phenix the FTC found retailers to be indirect purchasers from the manufacturer "because of the fact that [the manufacturer] recognize[d] the retailers buying through jobbers as customers by personally soliciting them and by making effective its price policies and schedules as applied to them." The FTC concluded that "A retailer is none the less a purchaser because he buys

indirectly if, as here, the manufacturer deals with him directly in promoting the sale of his products and exercises control over the terms upon which he buys." 25 F.T.C. at 546.

In a subsequent decision, Purolator Products, Inc. v. FTC, 352 F.2d 874 (7th Cir. 1965), the FTC again articulated the standards used in determining the applicability of the indirect purchaser doctrine:

> "'Where the prices to be charged the indirect purchaser are effectively established by the manufacturer, and where virtually all the conditions and terms upon which the sale is to be consummated are fixed by the manufacturer or are subject to its approval, the predicate for a finding that the indirect purchaser is a purchaser from the manufacturer has been constructed. Other factors to be considered in arriving at the conclusion are instances of direct contact between the indirect purcahser and the manufacturer, such as direct negotiation of franchise agreements, direct solicitation or orders by the manufacturer's salesmen. . . .'" 352 F.2d at 881 (emphasis added).

This doctrine "treats as the supplier's own customers, in contemplation of law, the accounts of his distributors whose autonomy he has supplanted by his own activities." Rowe, Price Discrimination Under the Robinson-Patman Act, § 4.5 at 57 (1962 ed.) and cases cited therein at 57-59.

Thus, where a defendant has actively solicited dealings with a plaintiff and exercises such complete domination and control over the terms of the sale from the middleman to the plaintiff that the middleman is merely a "dummy", the courts have determined that the plaintiff was a "purchaser"

from the defendant within the meaning of Section 2(a). In American News Company v. FTC, 300 F.2d 104 (2d Cir. 1962), the Court stated:

> "The 'customer' or 'purchaser' requirement marks one of the outer limits of the seller's responsibility not to discriminate. As long as he exercises control over the terms of a transaction he is held to this duty; otherwise the requirement of the statute could be easily avoided by use of a 'dummy' wholesaler." 300 F.2d at 109-110 (footnote omitted).

The Court approved the FTC's use of the indirect purchaser doctrine since the seller "'fixe[d] the prices, terms, and conditions of sale and negotiate[d] directly" with plaintiff. 300 F.2d at 110.

The Court in K.S. Corp. v. Chemstrand Corp., 198 F.Supp. 310 (S.D.N.Y. 1961) said of the indirect purchaser doctrine:

> "An indirect purchaser may come within Section 2 when the manufacturer deals directly with him in promoting the sale of his product and exercises control over the terms upon which he buys. Union News Co., Trade Reg. Rep. (F.T.C. Complaints, Orders, Stipulations, 1960-61) ¶ 29,335 (1961); Champion Spark Plug Co., 50 F.T.C. 30 (1953) (manufacturer conducted negotiations and set terms and conditions of sale); Dentists' Supply Co. of New York, 37 F.T.C. 345 (1943) (manufacturer solicited customers and suggested retail prices); Luxor, Ltd., 31 F.T.C. 658 (1940) (same); Kraft-Phenix Cheese Corp., 25 F.T.C. 537 (1937). Cf. Elizabeth Arden, Inc. v. F.T.C., 2 Cir., 1946, 156 F.2d 132.
>
> . . . .
>
> "When the manufacturer lacks sufficient contact with the indirect purchaser and/or

> sufficient control over the terms upon which he buys, the latter will not qualify as a 'purchaser' within the meaning of the act. Klein v. Lionel Corp., 3 Cir. 1956, 237 F.2d 13 (mere existence of fair-trade agreement insufficient to establish control); Baim & Blank, Inc. v. Philco Corp., D.C.E.D.N.Y. 1957, 148 F.Supp. 541 (finding that wholesaler set terms and conditions of sale). Cf. 1960 Antitrust Law Symposium, Trade Reg. Rep. No. 153, p. 107 (June 1960)." 198 F.Supp. at 312-313.

In Baim & Blank, Inc. v. Philco Corp., supra, the Court granted summary judgment for defendants despite plaintiff's attempt to invoke the indirect purchaser doctrine. The Court found that the manufacturer did not control the pricing and sales policies of the middleman from whom plaintiff had purchased the manufacturer's products despite the fact that the middleman was a wholly-owned subsidiary of the manufacturer.

Similarly, in Hiram Walker, Inc. v. A&S Tropical, Inc., 407 F.2d 4 (5th Cir.), cert. denied, 396 U.S. 901 (1969), although the manufacturer has 'missionary' men who provided retailers directly with advertising materials and generally supplemented national advertising campaigns of the manufacturer, the indirect purchaser doctrine was held not to be applicable because the manufacturer did not sell directly to the retailers or fix the prices or terms and conditions of sales to the retailers from middlemen. The court explained, "These missionary men are not salesmen, and do not

take orders for liquor." 409 F.2d at 7.

The indirect purchaser doctrine is clearly inapplicable to the facts of this case. Neither Ford nor FMC has ever sought to sell crash parts to anyone other than franchised dealers. They have never solicited or sought any purchases by FLM. Neither Ford nor FMC has placed any restriction or control on franchised dealers as to the territory in which they may resell crash parts, the purchasers to whom they may resell or the terms and prices at which they may resell. The franchised dealers are free to resell crash parts to anyone, on any terms and at any price.

Franchised dealers may or may not elect to reflect in whole or in part in their prices and terms of sale any discount, allowance or credit they receive from FMC with respect to their purchases of crash parts. Despite plaintiff's contrary assertions, whether a franchised dealer reflects in its prices or terms of sale any portion of any discount, allowance or credit received by it from FMC does not affect the receipt by the franchised dealer of any such discount, allowance or credit. Neither Ford nor FMC controls whether or not those resale prices and terms reflect any discount, allowance or credit received by the dealers. Consequently, a franchised dealer may, under defendants' system of discounts, allowances and credits, elect to retain them all, reduce its

prices across the board to all its customers or follow any other pricing and sales policy it chooses.

Defendants' contacts with plaintiff have been insignificant and totally lacking in the nature and character of the encounters which led the courts to apply the indirect purchaser doctrine in the cases discussed above. The fundamental distinction is that these contacts have not been part of any effort by Ford or FMC to solicit sales or to set the terms and conditions of sales of their crash parts. At no time have defendants sought to obtain business from FLM. Any incidental contacts were occasioned by defendants' business with their franchised dealers.

As noted above, Ford or FMC personnel in 1969 and 1970 examined FLM's records of its purchases of crash parts from Central and the relationship between Central and FLM. The purposes of these two examinations related solely to the propriety of Central's claims for wholesale incentive allowance credits and the propriety of the two parts code numbers assigned to Central. They were not part of any solicitation of sales to FLM by franchised dealers or by defendants. Similarly, the pickup of parts from FMC's Master Parts Distribution Center in Teterboro, New Jersey, is made by FLM after it has purchased the parts from a franchised dealer in a transaction to which FMC is a stranger.

These are the only direct contacts which plaintiff has ever had with Ford or FMC. It is frivolous for FLM to claim that these encounters, which are merely incidental to FMC's relationships with franchised dealers, constitute the sort of conduct which triggers the application of the indirect purchaser doctrine.

D. There is no evidence of any agreement or conspiracy in restraint of trade involving Ford or FMC.

We have previously noted that for there to be a violation of Section 1 of the Sherman Act there must be some contract or combination with others and not merely unilateral action. (See pp. 26-30, supra.)

In plaintiff's pretrial memorandum (pp. 5, 6 and 9) it argues that Ford has "conspired" with FMC. The argument is absurd. Prior to July 1, 1970, Ford itself performed all of FMC's functions. Nothing in the antitrust laws forbids a corporation from creating a wholly-owned subsidiary to perform certain specialized tasks. Nor is there any warrant for penalizing conduct perfectly lawful when performed by one entity if it is continued after a corporation splits itself in two to accomplish the same lawful end. Cf. Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19, 28-29 (1962).

Ford's relationship with FMC is readily distinguishable from the facts and the policies sought to be enforced in the cases cited by plaintiff. Ford and FMC have not held themselves out to the public as competitors as was the case in Kiefer-Stewart Co v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951). Nor was the creation of FMC an essential means to an end unlawful under the Sherman Act as in U.S. v. Yellow Cab Co., 332 U.S. 218 (1947) and Timken Roller Bearing Co. v. U.S., 341 U.S. 593 (1951).

As was pointed out in the Attorney General's 1955 Report:

> "Nothing in these opinions should be interpreted as justifying the conclusion that concerted action solely between a parent and subsidiary or subsidiaries, the purpose and effect of which is not coercive restraint of the trade of strangers to the corporate family, violates Section 1. Where such concerted action restrains no trade other than that of the parent and its subsidiaries, Section 1 is not violated." Report of the Attorney General's National Committee to Study the Antitrust Laws at 34 (1955).

Accord, Willis & Pitofsky, Antitrust Consequences of Using Corporate Subsidiaries, 43 N.Y.U.L. Rev. 20 (1968). In fact, Ford's creation of FMC is expressly sanctioned by Section 7 of the Clayton Act which provides:

> "[N]or shall anything contained in this section prevent a corporation ... from causing the formation of subsidiary corporations for the actual carrying on

> of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition."

As we have already noted with respect to plaintiff's objection that FMC sells crash parts only to franchised dealers, plaintiff's charge that Ford and FMC agreed or conspired with unspecified franchised dealers to restrain trade in crash parts is similarly groundless. (See pp. 22-30, supra.) The action of Ford and FMC about which FLM complains was the unilateral internal establishment of national distribution policy to which Ford and FMC have adhered. Contrary to plaintiff's assertions the evidence will show that neither Atlas nor Thomas was told to stop selling crash parts to FLM. Ford's distribution system for its crash parts imposes no restriction on the franchised dealers' choice of customers or terms or prices of sale. The facts of this case disclose no attempt by Ford or FMC to control in any respect the dealings between FLM and any franchised dealer. It would be hostile to established Ford policy. The record is sterile of any suggestion of an agreement or conspiracy of Ford or FMC with anyone to establish the Ford policies which are the gravamen of FLM's complaint. There are no grounds for any claim under Section 1 of the Sherman Act.

E. There is no evidence of any attempt by Ford or FMC to monopolize the wholesale trade in crash parts.

Plaintiff's arguments concerning defendants' alleged violations of Section 2 of the Sherman Act (Pl. Tr. Mem. 10-13) are neither grounded in fact nor supported by the cases cited. Ford and FMC are charged with attempting to monopolize what plaintiff refers to as the "distributor-jobber level" of crash parts distribution (Pl. Tr. Mem. 10, 11), which is a confusion of two distinct levels of distribution, namely, "distributor" and "jobber-wholesaler". (See pp. 5-10, supra.) We note that no such allegations are made in the complaint, and the facts are that neither defendant has ever evinced any interest in entering or controlling the "jobber-wholesaler" level of distribution -- the level to which plaintiff apparently refers. Any control by Ford or FMC over parts distribution ceases when the parts are sold to franchised dealers. FMC treats the sale to a franchised dealer as a sale to either a retailer or a jobber-wholesaler, depending upon what the dealer reports as to the disposition by it of the parts. But such disposition is the dealer's business, unfettered by any direction from FMC or Ford.

The cases cited by plaintiff in support of its argument under Section 2 of the Sherman Act (Pl. Tr. Mem. 11) are inapplicable to this action. In both Eastman Kodak Co.

v. Southern Photo Materials Co., 273 U.S. 359 (1927) and Poster Exchange, Inc. v. National Screen Service Corp., 431 F.2d 334 (5th Cir. 1970), cert. denied, 401 U.S. 912 (1971) plaintiffs were customers or former customers of defendants, and the courts found that defendants had raised their prices or refused to deal with those plaintiffs as part of an attempt to monopolize the wholesale or retail level of the distribution of their product. In each case the defendants were also acquiring control of plaintiffs' competitors.

In the present case, neither Ford nor FMC has ever sold parts to FLM nor directed franchised dealers to change the prices at which FLM or any other customer may purchase crash parts. Neither Ford nor FMC is attempting to compete with FLM at the jobber-wholesaler level of distribution. In addition, and contrary to plaintiff's contention, programs for launching independent dealerships (such as the Dealer Development Program) are not intended to permit FMC to compete at the jobber-wholesaler level of parts distribution. This program has a completely different objective: namely, to create and assist new dealers to grow and achieve full financial independence and thus increase, rather than diminish, competition at the jobber-wholesaler level. Finally, while Ford indisputably has a "dominant position" in the manufacture of Ford, Lincoln and Mercury crash parts, there is no allegation here -- nor can there be -- that Ford is attempting to exploit

Plaintiff's Pre-Trial Reply Memorandum,
September 23, 1974

Warren Ex 18

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FILM COLLISION PARTS, INC.,

Plaintiff,

-against-

73 Civ. 713 (TPC)

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

PLAINTIFF'S PRETRIAL REPLY MEMORANDUM OF LAW

Plaintiff's Exhibit
10:00 A.M.
September 23, 1975
Thomas P. Griesa U.S.D.J.

Julien G Schlesinger, P.C.
Attorneys for the Plaintiff
Office and Post Office address
2 Lafayette Street
New York, New York 10007
(212) 962-8020

BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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FILM COLLISION PARTS, INC.,

Plaintiff,

- against -

73 Civ. 713 (TFG)

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.
----------x

PLAINTIFF'S PRETRIAL REPLY MEMORANDUM OF LAW.

POINT I

The defendants claim, that as a matter of law, they have a right to, under the guise of permitting various discounts, allowances and incentives, control the sale and resale of crash parts by franchised Ford dealers and to drive out of business those firms such as the plaintiff whose activities in the resale of Ford crash parts they cannot control.

In the defendants' pretrial memorandum (p. 7), the defendants [illegible] that once the parts have been sold by Ford to a franchised dealer, the defendants do not attempt to

place any restriction or control as to the customer or the price at which these parts may be resold by the franchised dealers.

The defendants need not directly dictate to the franchised dealers the price or the customers to whom it may sell. The defendants, in our case, are accomplishing precisely that purpose, i.e. dictating to the dealer the price at which it must sell to the plaintiff, by charging the franchised Ford dealers an additional 25 percent on any crash part which they sell to the plaintiff while the same dealers are charged 25 percent less for the very same crash parts if those parts are sold to anyone other than the plaintiff.

Such conduct on the part of the defendants permits the defendants to reserve unto themselves the destiny and conditions of resale of Ford crash parts after the ownership and title of those parts is with the franchised Ford dealer. The Court very clearly stated in U.S. v. Arnold, Schwinn and Co., 388 U.S. 365, 87 S.Ct. 1856 (1967), that:

> "... If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale. ...

And that when a manufacturer does reserve control over the price and destiny of his product after title has passed to a distributor, it is a per se violation of Section 1 of the Sherman Act.

POINT II

The defendants have taken the position in their brief (pages 22, et seq.) that under the doctrine of U.S. v. Colgate and Co., 250 U.S. 300 (1919), they may deal with such customers as they wish and refuse to deal with others. However, the meaning of Colgate has been clarified in U.S. v. Parke, Davis and Co., 362 U.S. 29 (1967), to mean that a manufacturer may announce the terms and policy upon which it will deal and refuse to have business relations with anyone who refuses to follow that policy and that a simple refusal to deal without more is permitted under the Colgate doctrine. Here the defendants have gone far beyond the conduct which was deemed permissible in Colgate.

The defendants themselves did not refuse to deal with the plaintiff but rather issued a directive to all franchised

Ford dealers that the franchised Ford dealers would be charged an additional 25 percent on all crash parts which they sold to the plaintiff. Once the defendants have gone beyond a unilateral refusal to deal and instead accomplish their purpose of depriving the plaintiff of Ford crash parts through the use of intermediaries, and in combination with others, i.e., franchised Ford dealers, they have entered into a conspiracy and combination in restraint of trade and are in violation of Section 1 of the Sherman Act.

In U.S. v. General Motors, 384 U.S. 127, 86 S.Ct. 1321, the Court found a violation of Section 1 of the Sherman Act where it was shown that General Motors together with its franchised dealers had conspired to prevent certain discount dealers from selling General Motors' automobiles. The Court went on to state:

> "The principle of these cases is that where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct." (86 S.Ct. at 1331)

In our case, the defendants together with and through the use of the franchised Ford dealers have conspired to prevent the plaintiff from obtaining Ford crash parts or obtaining them at highly discriminatory prices and as such are in violation of Section 1 of the Sherman Act.

POINT II

The defendants have admitted that the plaintiff was the only one other than franchised Ford dealers, who was acting as a wholesaler of Ford crash parts. (See deposition of Morris J. Rowlands, P. 33, et. seq.) In light of this, it is obvious that the defendants' so-called 'policy' of not granting the wholesale incentive discount to franchised dealers except for sales directly to body shops and garages, was in effect a 'policy' directed at the plaintiff with the purpose of driving the plaintiff out of business.

The defendants attempt to justify their egregious combination with franchised Ford dealers to drive the plaintiff out of business on the grounds that the plaintiff is a "volunta

middleman' who has no right at law to exist. (P. 30, defendants' brief)

There can be no question that the plaintiff was operating a legitimate business in the sale of Ford crash parts to repair and body shops in the New York City area. The plaintiff did not compel any body or repair shops to purchase parts from it nor did it compel any franchised Ford dealers to sell crash parts to it. In the competitive market place, franchised Ford dealers found it profitable to sell to the plaintiff and repair and body shops found it economically beneficial to buy from the plaintiff. The defendants now claim that under the guise of a multifaceted series of discounts, especially the wholesale incentive discount, it may legally conspire and combine to restrain trade in the resale of Ford crash parts by franchised Ford dealers and to drive the plaintiff out of business.

It is a per se violation of Section 1 of the Sherman Act to conspire to restrain trade. Klein, supra, made it clear that when a manufacturer enters into an agreement with

distributors limiting the persons to which its distributors may sell, after the distributors have acquired title and dominion over the goods, such conduct constitutes a combination in restraint of trade and is a per se violation of Section 1 of the Sherman Act.

The defendants cannot escape Schwinn by not directly limiting the persons to whom its distributors may sell, but rather by creating a discriminatory price structure so in practice to limit the persons with whom its distributors can deal. Nor can the defendants escape the ramifications of Section 1 of the Sherman Act by creating an arbitrary classification for the plaintiff calling him a 'middleman' and thereby attempt to distinguish the plaintiff from all other customers who purchase Ford crash parts from franchised Ford dealers. The plaintiff is not more than just another customer for Ford crash parts who the defendants, by means of a discriminatory price structure, are preventing its distributors from dealing with.

The real reason the defendants are attempting to drive the plaintiff out of business is so that they can control the

price and the distribution of Ford crash parts through their control of franchised Ford dealers. If independant dealers in Ford crash parts, such as the plaintiff, are permitted to exist, competition as intended by the Sherman Act will inevitably set in and the defendants' control over their products and their prices will be limited. The attempt to drive a competitor or possible competitor out of business in order to maintain prices or to create or maintain a monopoly by means of predatory commercial behaviour such as is being undertaken by the defendants in this case has been condemned as a per se violation of the Sherman Act in Lorain Journal Co. v. United States, 342 U.S. 143, 72 S.Ct. 181 (1951).

POINT III

The defendants make mention of the fact that the wholesale incentive allowance for crash parts was established at the behest of the Federal Trade Commission and seem to take the position that this somehow permits them to violate the Sherman Act.

The Court, long ago, pointed out in United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811, that the approval or knowledge and acquiescence of Federal authorities do not provide immunity from the antitrust laws.

CONCLUSION

The acts of the defendants in this case have violated the antitrust laws of the United States. Judgment should be entered in favor of the plaintiff awarding them treble damages plus a reasonable attorneys' fee, and the defendants should be enjoined from continuing their course of conduct.

Respectfully submitted,

JULIEN & SCHLESINGER, P.C.

Attorneys for Plaintiff

Plaintiff's Proposed Conclusions of Law,
September 25, 1974

BEST COPY AVAILABLE

Received in Court
2:50 P.M.
September 25, 1974
David Clurfan Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FIM COLLISION PARTS, INC.,

Plaintiffs,

- against -

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

73 Civ. 713 (TPG)

PLAINTIFF'S PROPOSED CONCLUSIONS OF LAW

9/25/74

1. The defendants' control over the persons to whom Ford crash parts may be sold by franchised Ford dealers, after title and risk to those crash parts have passed to the dealer, is a per se violation of Section 1 of the Sherman Act.

2. The defendants, by charging franchised Ford dealers 25 per cent more for sales of Ford crash parts which they sell to the plaintiff or other independent wholesalers are engaged in de facto price fixing under Section 1 of the Sherman Act.

3. The defendants' attempt to drive the plaintiff out of business and to monopolize the after market in the sale of Ford crash parts is violative of Section 2 of the Sherman Act

4. The defendants' exercise of their position and power in directing franchised Ford dealers not to deal with the plaintiff constitutes a conspiracy and combination in restraint of trade in violation of Section 1 of the Sherman Act.

5. The defendants' refusal to deal with and the cutting off of the supply of crash parts to FIM, in view of the fact that such crash parts are not obtainable except through the defendants' and their franchise dealers, constitutes a violation of Section 2 of the Sherman Act.

6. The defendants' creation of a so-called policy which operated to prevent the wholesale incentive allowance being allowed for sales to the plaintiff and the defendants' operation of this scheme through the use of and in concert with franchised Ford dealers is a combination in restraint of trade in violation of section 1 of the Sherman Act.

7. The defendants, by terminating the plaintiff's right to receive the benefits of the wholesale incentive allowance and other benefits available to other wholesalers, were engaged in defacto price fixing in violation of secion 1 of the Sherman Act.

8. The defendants' discriminatory price structure, of compelling the plaintiff to be charged 25 per cent more than other purchasers for Ford crash parts, is violative of the Robinson-Patman Act.

9. The defendants' control over the sale of crash parts and the defendants' dealings with FLM made the plaintiff an indirect purchaser of the defendants.

10. The defendants' termination of plaintiff's right to receive wholesale incentive benefits and other wholesaler benefits which are available to other persons dealing in Ford crash parts constitutes price discrimination in violation of section 2(a) of the Robinson-Patman Act.

11. The defendants' granting of wholesale incentive discount to its franchise dealers for sales made by franchise dealers to their customers and its refusal to permit its dealers to receive the same wholesale incentive allowance on sale of crash parts to the plaintiff constitutes price discrimination in violation of section 2(a) of the Robinson-Patman Act.

12. The defendants have violated sections 1 and 2 of the Sherman Act and section 2(a) of the Robinson-Patman Act and the plaintiff is entitled to recover treble damages for any damage it has sustained by reason of the defendants' violation of the antitrust laws, plus reasonable attorneys' fees and the costs of this action.

13. That the plaintiff has suffered the following damages due to the defendants' violations of the antitrust laws (see Schedule A attached and plaintiff's brief on damages), plus reasonable attorneys' fees and the costs of this suit.

14. The plaintiff is entitled to an injunction enjoining the defendants themselves and/or by instruction to their franchise dealers from refusing to sell crash parts to the plaintiff so that the plaintiff shall ave the benefit of the wholesale incentive allowance, the stock order discount, the obsolesence credit, the surplus inventory reduction and any other wholesale benefits which are available to other persons acting as wholesalers for Ford crash parts.

15. Plaintiff is entitled to an order enjoining the defendants from directing or encouraging its franchised dealers to refrain from dealing with the plaintiff and from granting the plaintiff any discounts which the franchise dealer may wish.

16. The plaintiff is entitled to an order directing the defendants to sell Ford crash parts directly to the plaintiff on the same terms and conditions as the said parts are sold to the defendants' franchised dealers.

JULIEN & SCHLESINGER, P.C.

by: _____

Attorneys for plaintiff
2 Lafayette Street
New York, New York 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

73 Civ. 713
(TPG)

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,

Defendants.

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PLAINTIFF'S PRETRIAL MEMORANDUM OF LAW

Statement of Facts

In 1965, Stephen McKee and John Andidoro founded and incorporated FLM Collision Parts, Inc. (FLM), the plaintiff herein. The primary and now sole business of FLM is in selling replacement parts for Ford, Mercury and Lincoln automobiles. The parts dealt in by the plaintiff are usually 'crash parts', that is, replacement parts such as bumpers, fenders, etc., which are required by body shops to make repairs to vehicles after they have been involved in a collision.

UNITED STA TES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- x

FLM COLLISION PARTS, INC.,

Plaintiff-Appellee-Cross-Appellant,

-against-

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants-Appellants-Cross-Appellees.

Docket No. 76-7161

- x

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

GEORGE A. SCHOLZE, being duly sworn, deposes and says that he is an attorney associated with Sullivan & Cromwell, attorneys for Defendants-Appellants-Cross-Appellees; that on the 14th day of May, 1976 he caused the within Joint Appendix to be served upon Julien & Schlesinger, attorneys for Plaintiff-Appelllee-Cross-Appellant by having two true copies of the same delivered to said attorneys at Two Lafayette Street, New York, N.Y. 10007, by leaving the same with a person in charge of said office.

George A. Scholze

Sworn to before me this
18th day of May, 1976

Notary Public

ALAN IHNE
Notary Public, State of New York
Residing in Kings County
Kings Co. Clk's No. 24-7031350
Certificate Filed in
New York Co. Clk's
Commission Expires March 30, 1978